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ABSTRACT

The handbook analyzes implications of Sections 503 and 504 of the Rehabilitation Act of 1973 on the employment rights of handicapped persons. The first section reviews background information (including a summary of the law and regulations concerning employment) and discusses implications for hiring practices (including consideration of reasonable accomodation, hiring practices of federal contractors, and administrative complaint procedures). Placement practices, training opportunities, pay rates, benefits, promotion, transfer practices, and layoff and termination are among the post-hiring practices considered in the second section. (CL)

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HANDBOOK OF EMPLOYMENT RIGHTS OF THE HANDICAPPED:

SECTIONS 503 and 504

OF THE REHABILITATION ACT OF 1973

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Special thanks to all of the following as well as to anyone who was involved whom we have not named:

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And to Dick Hermann - for legal and other assistance throughout.

We hope that this handbook will help disabled consumers in realizing to the fullest extent their desire to be a part of the working society.

NOTE

During the preparation of this handbook, HEW was the only government entity which had regulations implementing Section 504. On January 13, 1978 HEW published the final guidelines for the implementation of Section 504 by the other federal departments and agencies. These departments and agencies must issue a notice of proposed rule-making within 90 days. The Small Business Administration issued its proposed rules on March 8, 1978.

TABLE OF CONTENTS

Page

Acknowledgements.. i
Glossary.. v

PART I: BACKGROUND INFORMATION AND DISCUSSION OF HIRING PRACTICES

CHAPTER L. Introduction

A. General Information.. 1
B. Special Considerations..................................... 2

1. Personel Action or Legal Action?...................... 2
2. Financing Legal Assistance............................ 3
3. Possible Harassment................................... 3
4. Legal Proceedings Can Be Lengthy...................... 4
5. The Individual's Role in Asserting His or Her Own Rights.. 4

C. Attitudes of Employers..................................... 5
D. Debunking the Myths.. 5
E. Format... 6
F. A Final Word of Advice..................................... 6

CHAPTER 2. An Overview: Summary of the Law and Regulations Concerning Employment

A. Section 503.. 7
B. Section 504.. 7
C. Requirements of Both Sections 503 and 504.................. 8
D. Application of Sections 503 and 504 to the Employment Relationship... 8
E. Complaint Procedures....................................... 9

CHAPTER 3. Reasonable Accommodation

A. The Employer's Legal Obligation............................ 10
B. Examples of Reasonable Accommodation....................... 11
C. The Importance of Reasonable Accommodation in Your Preparation for an Interview................................ 13

CHAPTER 4. Getting Hired by a Recipient of Federal Funds from HEW: A Case Study

A. Recruitment, Application Procedures, Job-Related Requirements, Medical Requirements.............................. 14
B. Tests.. 17
C. Evaluation of Qualifications -- Interviews................. 17
D. Final Selection.. 18
E. Effect of Collective Bargaining Agreements, State and Local Laws, and Employment Opportunities.................... 19

Page

CHAPTER 5. Section 503 -- Getting Hired By a Federal Contractor: A Case Study

A. Recruitment........ 20
B. The Application........ 20
C. The Rejection Letter........ 21
D. Tests........ 22
E. Evaluation of Qualifications -- Interview........ 22
F. Final Selection........ 23
G. Effect of Collective Bargaining Agreements........ 23

CHAPTER 6. Administrative Complaint Procedures -- Enforcing Sections 503 and 504

A. Enforcing Section 503........ 24
B. Enforcing Section 504........ 27
C. Further Action and Related Concerns for Both Sections 503 and 504........ 29

PART II: POST-HIRING PRACTICES

Introduction........ 31

CHAPTER 7. Placement Practices

A. Overview........ 32
B. Entry-Level Positions........ 32
C. Dead-end Jobs........ 32
D. "Ghettos"........ 33

CHAPTER 8. Training Opportunities

A. Overview........ 34
B. Case Study: On-the-job Training........ 35

CHAPTER 9. Rates of Pay

A. Overview........ 37
B. Possible Employer Contentions........ 38
C. Case Study: Comparing Job Requirements........ 39

CHAPTER 10. Benefits, Privileges and Conditions of Employment

A. Fringe Benefits........ 40
B. Rights and Privileges of Employment........ 40

CHAPTER 11. Promotion

A. Overview........ 42
B. Specific Problems in Promotion........ 43
C. Case Study: Discrimination in Promotion Practices........ 44

Page

CHAPTER 12. Transfer Practices

A. Overview.. 47
B. Bidding Systems.................................... 47
C. Notice Requirements................................ 48
D. Rate Retention..................................... 48
E. Transfer Following Disabling Injury or Illnes...... 48
F. Reasonable Accommodation and Transfers............. 49
G. Case Study: Transfer Practices..................... 49

CHAPTER 13. Layoffs and Right of Recall

A. Overview.. 53
B. Non-Union Employees................................ 53
C. Union Employees.................................... 53
D. Layoffs and "Super"-Seniority...................... 55
E. Case Study: Layoffs................................ 55

CHAPTER 14. Termination

A. Overview.. 56
B. Employer Justifications............................ 57

Notes... 61
Appendix A.. 69
Appendix B.. 71
INDEX... 74

GLOSSARY

ACCESSIBILITY - A program, activity or facility that is made readily available to and usable by a handicapped person. Accessibility may involve redesign of equipment, reassignment of meetings or services to accessible buildings or making aides available. Accessibility will be measured by viewing an activity or facility in its entirety and should focus on minimizing separate programs or facilities.

ADAPTIVE EQUIPMENT - Any device or mechanical equipment that enables a worker to minimize the effect of a handicap or limitation on the performance of a particular task or participation in an activity.

ADMINISTRATIVE COMPLAINT PROCEDURE - A procedure provided by an administrative agency, such as the Department of Labor, whereby you can file a complaint initiating a legal proceeding with the agency against the alleged wrongdoer. Both Sections 503 and 504 of the Rehabilitation Act provide administrative complaint procedures. Such procedures are less costly and sometimes more efficient than legal actions in court.

AFFIRMATIVE ACTION - Federal contractors covered by Section 503 of the Rehabilitation Act must take affirmative action in all their employment practices. This means that they must take positive steps to increase employment opportunities for qualified handicapped persons. Two ways that this is accomplished are through appropriate outreach and positive recruitment steps. Affirmative action must be taken at all levels of employment.

BACK PAY - The wages the handicapped employee would have received in a job for which he or she was qualified but was prevented from performing, or continuing to perform in, because of an act of discrimination by the employer.

BONA FIDE OCCUPATIONAL QUALIFICATION (essential requirement, job-related requirement, incidental duties) - Any qualification requirement that tends to screen our qualified handicapped individuals must be related to the specific job and consistent with business necessity and safe performance of the job. Proof of bona fide occupational qualification is the burden of the employer.

COLLECTIVE BARGAINING AGREEMENT - A contract negotiated by the union representative on behalf of all workers; an appropriate bargaining unit that sets forth the essential rates of pay, wages, hours of employment, or other conditions of employment.

DOL - The Department of Labor.

DIFFERENT OR SEPARATE AID, BENEFIT OR SERVICE - To be nondiscriminatory, such aid, benefit or service must be necessarily separate or different and must be delivered or operated in the most integrated setting appropriate to the beneficiary's needs.

DISCRIMINATION - The refusal, failure or assistance by a "covered" employer to an agency, organization or person who refuses or fails to hire, retain or advance a qualified handicapped person in employment; the failure to provide equal or equally effective aids, benefits or services; or the provision of a different or separate aid, benefit or service, to a qualified handicapped person, unless that is what is necessary to yield an equal opportunity.

EQUALLY EFFECTIVE AID, BENEFIT OR SERVICE - An adjustment to, or provision of a different aid, benefit, or service to meet the individual needs of a beneficiary that ensures equivalent opportunity to achieve identical results.

ESSENTIAL VS. INCIDENTAL FUNCTIONS - Those tasks which compose the core duties of a particular job classification or definition, as opposed to those which bear only a marginal relationship to a particular job.

FEDERAL CONTRACTOR - Anyone who has a contract with the Federal government. In the context of Section 503 of the Rehabilitation Act, it is anyone who has a contract with the Federal government worth $2,500 or more. Certain Federal contractors cannot discriminate and must take affirmative action toward qualified persons who are physically or mentally handicapped.

FEDERAL GRANTEE - See "Federal Recipient."

FEDERAL RECIPIENT - Anyone who receives some sort of financial assistance from the Federal government. Under Section 504 of the Rehabilitation Act a Federal recipient cannot discriminate against qualified persons who are physically or mentally handicapped.

FRONT PAY- An award of the wages an employee would be presently earning, where the employee has been laid off to make room for a handicapped worker. Such relief may also be necessary to compensate a handicapped worker if court does not wish to "bump" other employees to put the handicapped employee in his or her rightful position.

HANDICAPPED - For purposes of the Rehabilitation Act, a "handicapped" person is (1) anyone who now has a physical or mental handicap which substantially limits one or more major life activities, (2) anyone who has a record of such a handicap, and (3) anyone who is regarded by the employer as if he or she had such a handicap. Section 504 of the Rehabilitation Act notes a number of examples of "physical or mental" impairments, including: (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (42 Fed. Reg. 22680 (1977) to be codified in 45 Fed. Reg. 84.3 (j) (2) (i)). Alcoholism and drug addiction are also considered handicaps within the context of the Rehabilitation Act to the extent that either one substantially limits a major life activity.

HEW - The Department of Health, Education and Welfare.

IN-HOUSE COMPLAINT PROCEDURE - A procedure provided by the employer within his or her organization for processing employee complaints.

JOB MODIFICATION - Takes advantage of special skills and aptitudes of a handicapped worker; allows for the total job to be completed with two or more workers contributing different skills to its performance.

JOB-RELATED CRITERIA - Test or other selection standards that are valid predictors of effective job performance or safety and do not measure merely the ability to see, hear, or perform manual or mental tasks that are not necessary to job performance.

LEGAL ACTION - A legal proceeding initiated to correct a wrong. Court actions and administrative complaint procedures are both legal actions.

LINES OF PROGRESSION - A system of classifying jobs so that the worker advances through job functions which require related skills as the worker attains those skill levels.

MAJOR LIFE ACTIVITIES - Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working are examples of major life activities.

OCR - Office for Civil Rights of the Department of Health, Education and Welfare. This office is charged with the HEW administration of Section 504 of the Rehabilitation Act.

OFCCP - Office of Federal Contract Compliance Programs of the Department of Labor. This office is charged with the Federal government's administration of Section 503 of the Rehabilitation Act.

PERSONAL ACTION - What you do on your own, that is, short of legal action, to protect your rights. Personal action mainly includes talking to the employer; attempting to persuade him to make certain accommodations or to do whatever is necessary to comply with the law.

QUALIFIED HANDICAPPED PERSON - According to the HEW regulations for Section 504 of the Rehabilitation Act, a qualified handicapped person with regard to employment is a handicapped person who, with reasonable accommodation, can perform the essential functions of a particular job. According to the Section 503 regulations, a qualified handicapped person is a handicapped person who is capable of performing a particular job with reasonable accommodation to his or her handicap.

REASONABLE ACCOMMODATION - A reasonable accommodation is an adaptation of the workplace, the equipment, or the job itself that enables you to do a particular job for which you are qualified in training and abilities. The regulations for both Sections 503 and 504 of the Rehabilitation Act require the employer to make a "reasonable accommodation" to your known physical or mental handicaps. The regulations for both Sections 503 and 504 define a qualified handicapped person in terms of what a handicapped person can do once a reasonable accommodation is made.

RETROACTIVE SENIORITY - An award of seniority to a handicapped person to remedy the effects of a discriminatory denial of hire or advancement in employment to a qualified handicapped person.

RED-CIRCLING OF WAGES - Mechanism by which wage rate of an employee who transfers goes with the person -- even though the new department to which he moves would pay the transferee a lower wage. The purpose of the remedy is to protect the employee from financial loss until he has an opportunity to learn the new skills to progress in the new department to a wage equal to his old department scale.

REVERSE DISCRIMINATION - Preferential treatment of one minority group over another group of persons to correct present inbalances in the representation of an employer's workforce due to past discriminatory practices. Reverse discrimination is prohibited under almost all circumstances.

SELF-EVALUATION - The duty of a recipient under Section 504 within one year of the effective date of the guidelines after consultation and with the assistance of interested persons, to: evaluate current policies and practices and the effects thereof; modify any discriminatory policies or practices; take appropriate remedial steps to eliminate the effects of any discrimination resulting from adherence to these policies or practices.

SENIORITY - Length of continuous regular assignment in a job classification within a department, plant, or company of a covered employer.

TEST AND SELECTION CRITERIA - Any criteria which form the basis for decisions by an employer to hire, transfer, promote, train, refer or retain a handicapped person which are demonstrated to have a significant relationship between successful test performance and job behavior. "Test" will include all formal, scored, qualified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers rating scales, scored application forms, etc.

TEST VALIDITY - Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of, or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated. Tests that predict performance at a higher level than entry-level are a relevant criterion only when there is a high probability that persons employed will in fact attain higher level jobs within a reasonable period of time.

UNDUE HARDSHIP - The employer's obligation to make a reasonable accommodation is limited to what the employer can do without creating an undue hardship on the conduct of his or her business (Section 503 of the Rehabilitation Act) or the operation of his or her program (Section 504 of the Rehabilitation Act). Just what will create an undue hardship in the context of legislation intended to expand job opportunities for the handicapped is unclear. There are examples with regard to religious discrimination, but these seem to be too limiting to be applied to Sections 503 and 504.

PART I: BACKGROUND INFORMATION AND DISCUSSION OF HIRING PRACTICES

CHAPTER 1: INTRODUCTION

A. GENERAL INFORMATION

It is usually not easy for anyone to find a job or to remain employed. However, if you are a person with a physical or mental handicap you may have a more difficult time finding and advancing in employment. You may have already experienced an employer's refusing to hire you or to promote you, regardless of your abilities or training, solely because of your handicap. Such actions by employers may violate Federal law, and it usually depends on you to make certain that such laws are enforced. The purpose of this handbook is to examine an employer's obligations under Federal law in order to inform you of certain employment rights which you have and to suggest what steps you may take to protect those rights. These suggestions include what you might do personally, as well as what you can do through legal action, to force employers to comply.

One Federal law which greatly expands your employment opportunities is the Rehabilitation Act of 1973. This handbook is about your employment rights with two groups of employers covered by the Rehabilitation Act: those who do business under contract with the Federal government ("Federal contractors"), and those who receive Federal financial assistance ("Federal recipients"). Another section of the Rehabilitation Act, Section 501, requires the Federal government to take affirmative action in hiring, placement and advancement of handicapped persons. Although Section 501 is not covered here, you should be aware that affirmative action requirements exist.

Federal contractors must comply with Section 503 of the Rehabilitation Act and with the Department of Labor regulations implementing the section. Section 503 requires that any employer who provides $2,500 or more worth of goods or services under contract to the Federal government cannot discriminate against and must take "affirmative action" in employing and advancing qualified handicapped persons. Some employers may be excepted from this requirement, but as a general rule, Section 503 applies.

Federal recipients must comply with Section 504 of the Act which requires that any recipient of financial assistance from the Federal Government cannot "discriminate" against qualified handicapped persons. In addition, federal recipients must comply with regulations declared by the Federal department or agency granting the financial assistance. At this time, the Department of Health, Education and Welfare is the only department or agency which has regulations in effect.

You can take advantage of the information in this handbook when you know that a certain employer is required to comply with Section 503 or 504. There are a number of ways to try to get this information. All Federal contractors covered by Section 503 are required to post a notice announcing their obligation and summarizing your rights under the law [60-741.4 (d)].*

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* Sections of the regulations are noted in this abbreviated form as a convenience to readers who wish to consult the language of the regulations. Reference is made to the regulations for Section 503, at 41 C.F.R. part 60-741 (1976).

Recipients of financial assistance from the Department of Health, Education and Welfare (HEW) who employ fifteen or more persons are required to post a notice that they must comply with Section 504 [84.8].[*] At this time there are no posting requirements for other recipients of Federal aid because the other agencies which give Federal grants (for example, the Department of Transportation) have yet to issue regulations for Section 504.

Another way to learn which employers have special obligations is from government agencies. You may be able to find out whether a certain employer is a government contractor from your regional Department of Labor, Office of Federal Contract Compliance Programs. (The Addresses are listed in Appendix A.) Your regional office of the Department of Health, Education and Welfare (HEW) may be able to tell you whether a certain employer receives financial assistance from the Department. (These addresses are listed in Appendix B.) Typical recipients of HEW aid are schools, health care facilities, and social welfare facilities. You could also check your local state or Federal employment service office; Federal contractors may notify these offices of openings and of their obligation to take affirmative action on behalf of the handicapped.[1]

This handbook is written principally for the mentally or physically handicapped person who is looking for a job or already has one. It should also be helpful to anyone who is interested in helping a handicapped person find, keep, and advance in employment. Under the Act, "handicapped persons" include:(1) anyone who now has a physical or mental handicap which substantially limits one or more major life activities(2) anyone who has a record of such a handicap, and (3) anyone who is regarded by the employer as if he has such a handicap, even if he does not.[2]

Naturally, for the employer to recognize your rights under Section 503 or 504, the employer must know you are handicapped within the meaning of the law. An employer will know that you are handicapped if your handicap is visible, if it is discovered by an examination or inquiry, or if you notify him.

The handbook is not a substitute for an employment counselor or for personal legal advice. Counselors can tell you about the types of jobs in your locale. They may be able to tell you what specific abilities and training are required for a job, and may have some helpful information on a specific employer. With regard to informal or formal legal action, it is not possible to suggest in a handbook what can be done in each individual case. However, this handbook can help you decide when legal advice may be helpful or necessary.

B. SPECIAL CONSIDERATIONS

1. Personal Action or Legal Action? Chapter 6 of this part outlines how to file an administrative complaint against an employer who fails to comply with Section 503 or Section 504 as implemented by the regulations discussed in this handbook. However, the complaint process should not be thought of as the only means by which you can press an employer to recognize your 503

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[*] Sections of the regulations are noted in this abbreviated form for readers who wish to consult the original language. Reference is made to the regulations for Section 504, at 42 Fed. Reg. 22676 (1977) (to be codified in 45 C.F.R. part 84).

or 504 rights. Legal processes always take time and can require money. To avoid spending too much of either in getting your rights, you may want to try to take as much personal initiative as you possibly can to persuade and to help the employer comply with the relevant section of the law or regulations.

When you suspect that an employer has failed or refuses to comply with his Section 503 or 504 obligations to you, consider what you can do on your own to protect your rights. For example, after you are certain that you are not hired, ask - in person or by mail - for the reasons that you were not hired and someone else was. If the employer answers this question and you are not satisfied that the employer has complied with the law, you might want to remind him or her of his or her obligations under Section 503 or 504. Prepare for such a conversation by knowing what your rights are under Section 504. If possible, discuss how you should proceed with regard to a particular employer or situation with someone, perhaps an attorney, who is familiar with Section 504 before you discuss it with the employer.

Do not expect that an employer will change his or her decision and hire you just because you know your rights. However, an employer who knows that it will be difficult to prove that he or she was complying with the law may try to resolve the problem with you rather than let you file a complaint.

Whenever you do discuss any aspect of the employer's Section 503 or Section 504 obligations to you, be sure you do not compromise your right to take legal action against him or her. In the event that you do not feel comfortable personally discussing the situation with the employer, or if you are not successful, the following considerations may be important.

2. Financing Legal Assistance. Some people with a limited income qualify for tax-supported legal services and may relieve their own financial burden by requesting representation from one of these organizations. Eligibility is determined by several factors, and it is somewhat different in each area of the country. The factors considered may include income and other financial assets, the number of dependents, debts and medical expenses, and the cost of living in your area.[3] Check your phone book under "legal aid," "legal assistance," and "legal services" to see if there is an office in your area. You will have to contact that office for specific information about your eligibility. If you do not qualify for legal aid in your area, you may be able to find an attorney who is willing to handle your case for free (in legal terms, this is on a "pro bona" basis). You should ask a large law firm if it would be willing to take you case for free, since large firms may be more willing to handle a civil rights case for free. Other attorneys may be willing to handle your case on a contingency basis, especially if you want to get back pay in your lawsuit. "Contingency" means that your attorney receives a percentage of any money you receive if you are successful in court or in a settlement, and takes nothing if you lose.

3. Possible Harassment. Another consideration is the possible effect a legal challenge might have in the workplace. Although Sections 503 and 504 prohibit retaliations against anyone who asserts his rights under the law, the possibility of harassment does exist. In the event that there is any harassment, you can file a complaint against the employer. If you already filed a complaint, then you should tell the government office that is handling your complaint about the harassment.

4. Legal Proceedings Can Be Lengthy. Finally, you should remember that the complaint process can take many months, even years, to complete. For this reason alone, you may want to try to persuade the employer yourself that he or she has violated the law and your rights and that he or she should correct the situation or you will file a complaint.

5. The Individual's Role In Asserting His Or Her Own Rights. Second thoughts should not discourage you from asserting your rights. Your role in protecting your own rights is essential. In A Handbook on Legal Rights of Handicapped People, prepared for the President's Committee on Employment of the Handicapped, the authors emphasized the importance of handicapped persons aggresively protecting their rights:

> Infringements on legal rights are illegal. Yet, it is only when handicapped citizens start taking constructive action, that changes will occur. Voice your complaints, whenever violations of the law become known to you....In the final analysis, it is up to you to assert your rights and to make sure that they are not violated.[4]

The Rehabilitation Act is a major step forward. However, you must realize that the laws themselves are not a complete solution. The authors of this handbook believe that information is an important tool for creating change. In view of this, it is our purpose to tell you what the law says regarding your rights as a handicapped applicant or employee. We will explain how these rights operate in the context of various employer or industry practices. Some actions by employers violate the law. It will usually depend on you to enforce these laws which safeguard your rights. Be assertive! As will be explained further, legal action is available under the Act if an employer refuses to hire or advance you because of your handicap.

However, the authors believe that the threat of filing a complaint against an employer should be one of your last resorts. This is our position for two reasons: the first is that legal action often alienates the respective parties and makes resolution more difficult; the second is that we believe that the current mechanisms for enforcement of the Act are too inadequate to bear the entire burden for ensuring compliance.

Therefore, each handicapped individual must become his or her own best advocate. With the knowledge that you have about your disability, and with the information we will provide regarding job practices, it is our hope that you will have a greater sensitivity to possible discriminatory situations. We further hope that you will aggressively pursue enforcement of these rights by initially attempting to work the problem out with your supervisor or employer. Persuade them to take the course of action you seek voluntarily. When difference of opinion occurs, it is better to assume that your opponents are not utterly unlike yourself. Many of the bad acts that each of us commit are caused by ignorance and thoughtlessness; truly bad men and women are rare.

Thus, the value of persuasion becomes clear. Few persons take an interest in, or have sympathy for, something which they know nothing about. For the majority of employers, a handicapped person is a stereotype created by past information, myths and cliches. Changing these beliefs requires perseverance, patience and a certain amount of tolerance. The initial effort should be to advise, not attack; to counsel, not to threaten.

It is important that you understand the law in a personal way, and learn the alternative enforcement mechanisms available to you. In this way, you may be able to obtain your rights without going through the legal system. The vitality of the legal system is best served by people attempting to first resolve differences among themselves, in order to sort out truly hostile interests from conflicts based on misinformation or misunderstanding.

C. ATTITUDES OF EMPLOYERS

The business community fundamentally believes that all people should be paid in accordance with what they contribute. Industry tends to view itself as on the defensive against every new minority movement which attacks industry as the enemy. The traditional attitude of employers toward social reform has been to agree that change must be made, indicate willingness to help, but protest the cost of reform as forced charity. Viewed as a whole, the result has been indifference and the use of myth and stereotype as justifications for intolerance.

D. DEBUNKING THE MYTHS

Unfounded myths and misinformation make employers reluctant to hire otherwise qualified job seekers with disabilities. Many of these myths have been rebutted in studies done comparing the job performance of handicapped versus regular workers. One such study was conducted by the DuPont Company of Wilmington, Delaware, a company of 110,000 workers, which gathered data on its 1,452 employees with physical handicaps. These included persons with orthopedic problems, blindness, heart disease, vision impairment, amputations, paralysis, epilepsy, hearing impairments and total deafness.

The DuPont findings[5] rebutted certain common misconceptions:

"Insurance rates will skyrocket."

The DuPont study demonstrated that it had no increases in compensation costs nor lost-time injuries as a result of hiring the handicapped. Further, most states have some form of second injury funds to cover cases where a handicapped worker receives a second injury that leaves him or her totally disabled. In such a rare occurence, the employer is responsible only for the cost of the second injury.

"Adjustment to the work area will involve considerable expense."

Most handicapped workers require no special work arrangements. Those modifications which are necessary, generally involve minor adaptations. Special privileges were requested seldom. The handicapped worker wants to be treated like everyone else.

"The company's safety record will be jeopardized."

The DuPont survey found that 96% of handicapped workers rated average-or-better in safety both on and off the job. The handicapped workers generally averaged a slightly lower number of days lost per injury.

"Handicapped people are not as productive as unimpaired workers."

The DuPont study revealed that 91% of the company's disabled workers rated average or better when compared with the general workforce. In attendance, 79% of the disabled employees rated average or better.

As the study concluded, in many areas such as safety, motivation and job performance, the disabled worker actually performs better than the non-disabled employee. Use this knowledge with confidence, to "sell" yourself to a prospective employer!

E. FORMAT

This handbook examines case studies and simple examples to highlight the requirements of Sections 503 and 504 which are most likely to concern you in your relationship with an employer. The case studies and other examples are used to help you recognize violations of your rights under Sections 503 and 504 in any phase of the employment relationship. The situations examined range from job applications to fringe benefits.

Part I focuses on hiring practices of employers. Part II focuses on employment practices which affect you after you are hired. In each part the authors attempt to give you a clear understanding of your rights and how to protect them informally on your own and more formally through legal proceedings. Whenever possible, the authors advocate an interpretation that supports those rights.

F. A FINAL WORD OF ADVICE

Learn as much as possible about the jobs for which you apply. Learn about advances in technology or design of adaptive devices for your particular disability. This knowledge will aid you in suggesting accommodations for your handicap. Moreover, it will establish your firm intentions to land a particular job with any skeptical employer.

CHAPTER 2: AN OVERVIEW: SUMMARY OF THE LAW AND REGULATIONS CONCERNING EMPLOYMENT

A. SECTION 503

Section 503 of the Rehabilitation Act as implemented by the Department of Labor, requires that any employer who provides $2,500 or more worth of goods or services under contract to the Federal government cannot discriminate against and must take affirmative action in employing and advancing qualified handicapped persons. Some employers may be excepted from this requirement, for example in some cases where the national security is involved, but as a general rule Section 503 and the regulations apply to all such contractors and subcontractors. The employer agrees to the nondiscrimination and affirmative action requirements as part of his or her contract. The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor prepared the implementing regulations and is responsible for the administration and enforcement of Section 503 and the regulations.

The employer meets his obligation not to discriminate by giving the handicapped individual an equal opportunity to be hired or to benefit from various employment practices. Nondiscrimination means more than not actively discriminating. It can require positive steps by the employer because the same treatment of both handicapped and nonhandicapped persons might result in discrimination. The objective of nondiscrimination is to give an equal opportunity to the handicapped person. The regulations implement the concept of nondiscrimination by requiring the employer to make reasonable accommodations or adaptations to your physical or mental handicaps to enable you to do the job if you are otherwise qualified for it. These changes can be made in the workplace, the equipment or the job itself, This does not guarantee you the job, or promotion, etc., but it helps highlight your qualifications rather than your disability. (Reasonable accommodation is discussed in Chapter 3.)

The employer's obligation to take affirmative action requires a more vigorous effort than does nondiscrimination. Whereas, by not discriminating, the employer must make the opportunities as equal or possible, affirmative action requires him or her to take further positive action such as appropriate outreach and positive recruitment steps to increase employment opportunities for qualified handicapped individuals. A complete description of affirmative action includes all of the obligations beyond nondiscrimination placed on employees by Section 503 and by the implementing regulations. These requirements are discussed in this handbook.

B. SECTION 504

Section 504, and the implementing regulations prepared by the Office for Civil Rights in the Department of Health, Education and Welfare, require that any recipient of financial assistance from the Federal government cannot discriminate against qualified handicapped persons. The nondiscrimination requirement under Section 504 is similar to that under Section 503. In other words, the objective is to give an equal opportunity to the handicapped individual, and to achieve this result, the employer may have to take positive steps such as making an accommodation to the handicap of the applicant or employee.

Section 504 does not require affirmative action as a general matter, but similar action is sometimes required, or may be voluntarily elected, when an employer must overcome past discriminatory practices [84.6].

Section 504 applies to all recipients of federal financial assistance, although at this time the Department of Health, Education, and Welfare is the only Federal department or agency which has implemented the law through a set of regulations. [See 45 C.F.R. pt. 84 (42 Fed. Reg. 22676, 1977)] Like the regulations for Section 502, these regulations explain in detail what must be done to comply with Section 504 -- by the employer, by HEW, and by you (if you file an administrative complaint). The Office for Civil Rights (within HEW) is responsible for administration of Section 504.

This handbook discusses in detail the Section 504 requirements expressed in the law and in the HEW regulations. However, every employer who is a recipient of federal funds, must comply with the basic nondiscrimination requirement. (How to discover which employer is a recipient of federal funds is discussed in Chapter 1.)

C. REQUIREMENTS OF BOTH SECTIONS 503 AND 504

An employer's obligation to you under either Section 503 or Section 504 is only triggered if you are a "qualified handicapped" person as defined by the law. You have rights under these sections, only if you fit the definitions of these terms.

With regard to employment, a handicapped person is:

(1) someone who has a physical or mental handicap which substantially limits his ability to work; or

(2) someone who has a record of such a handicap; for example, someone who has a history of the kind of handicap referred to in (1) even though he is recovered, or who has been misclassified as having that kind of handicap; or

(3) someone who is regarded as having such a handicap; that is, someone whose handicap does not substantially limit his ability to work, or someone who does not have a handicap at all, but who is treated as if he has a substantially limiting handicap.[6]

Most of the case studies and the other examples in this handbook refer to individuals in the first group, but all persons who are "handicapped" have equal rights.

A "qualified" handicapped person is a handicapped person who, with reasonable accommodation to his handicap, can do the "particular job" (Section 503) or the "essential functions of the job" (Section 504).

D. APPLICATION OF SECTIONS 503 AND 504 TO THE EMPLOYMENT RELATIONSHIP

Sections 503 and 504 cover all employment practices. Therefore, you have a right to expect that a federal contractor (covered by Section 503) will not discriminate against you in any, and will take affirmative action in all, employment practices. Likewise, you have a right to expect that a federal recipient (covered by Section 504) will not discriminate against you in any employment practices. For example, federal contractors and federal recipients must be fair to you in all of their hiring practices. Hiring "practices" include: recruiting, job advertising, application procedures, mental and physical job qualification requirements, interview procedures, medical examinations, tests, evaluation of your qualifications, final selection of the employee, and whatever other requirements or procedures the particular employer uses.

E. COMPLAINT PROCEDURES

The regulations for both Sections 503 and 504 provide an administrative complaint procedure which enables you to seek enforcement of Section 503 or Section 504 by the government. An administrative procedure is filed with the proper federal agency or department, rather than with a court. Procedures for filing a complaint are discussed in Chapter 6.

As you read the case studies and analyses in the following chapters, remember that when an employer violates the law, the handicapped applicant (or employee) has a right to file an administrative complaint against him. However, in each example, consider what is or can be done short of legal action. Some applicants or employees may be able to resolve the situation informally or through procedures provided by the employer. Such informal or employer-provided ("in-house") procedures will probably give you a much quicker resolution than filing a complaint.

If you do want to file a complaint, it is best to wait until the employment practice is completed with regard to you. For example, if you suspect you are being discriminated against, wait until your application for employment or for a promotion is turned down, before you file. Before you know just how the employer treats you, you do not have a good argument that he violated your 503 or 504 rights.

CHAPTER 3: REASONABLE ACCOMMODATION

A key requirement in both the Section 503 regulations and those for Section 504 is that of "reasonable accommodation." A "reasonable accommodation" is an adaptation of the workplace, the equipment, or the job itself that enables you to do a particular job for which you are qualified in training and abilities. The regulations require the employer to make a "reasonable accommodation" to your known physical or mental limitations [60-741.6(d); 84.12(a)]. From your point of view, this is extremely important. Under the requirement, the only proper way for the employer to evaluate your ability is to take into consideration what you could do in the job if a reasonable accommodation is made.

The reasonable accommodation requirement is common to both affirmative action and non-discrimination. It makes the practical effect of both of these statutes very similar for you. Whether you apply to a federal contractor or a recipient of federal funds, each employer is obliged to consider the effect of an accommodation and to make the accommodation if it is reasonable and if you are hired, promoted, or whatever the situation is.

A. THE EMPLOYER'S LEGAL OBLIGATION

1. "Reasonable Accommodation". The employer owes a 503 or 504 obligation to handicapped persons who are "qualified" for a job. With regard to Section 503, you are "qualified," if you are able to do the particular job with reasonable accommodation to your handicap. The definition for Section 504 is slightly different. With regard to Section 504, you are "qualified," if, with reasonable accommodation to your handicap, you are able to do the essential functions of the job. In both cases, the employer must make a reasonable accommodation.

Case Study and Comment. Bill is a typist and he uses a wheelchair. He applies for a typist's position where a usual part of the job is delivering the outgoing letters to the mailroom in another building. Because he is in a wheelchair, it is impossible for him to go to the mailroom in the time that has been allowed by the employer for making the trip. Assume that the employer is either a federal contractor or a federal recipient, and so must comply with Section 503 or 504. For the present time forget about the differences between Sections 503 and 504, and focus on the obligation to make a reasonable accommodation.

To decide if Bill is qualified for the job, the employer must consider what accommodations can be made and evaluate his abilities for the job on that basis. One possibility is that the employer can restructure the job so that someone else delivers the mail while Bill does some of that person's usual work. When the employer evaluates Bill's qualifications she cannot exclude him solely because he cannot deliver the mail quickly.

Bill's situation illustrates the importance of the "reasonable accommodation" requirement in increasing job opportunities. Suppose that the employer did not have to consider an accommodation when she evaluated Bill's qualifications. In that case, she might have concluded that he was unqualified without even considering his typing abilities. As soon as she discovered that

Bill could not make the trip to the mailroom fast enough, she might have automatically rejected him. But the reasonable accommodation requirement does not allow the employer to cut short her evaluation when she discovers the handicapping effect of Bill's condition on the job. The employer's decision that Bill is one of the "qualified" applicants does not guarantee Bill the job, but it is a necessary step toward his being hired.

2. The "Undue Hardship" Exception. Both the Section 503 and Section 504 regulations stop short of requiring the employer to make an accommodation in every case where a handicapped person could be employed. The employer is able to avoid the accommodation obligation when it would create an "undue hardship" for the operation of his program or for the conduct of his business.

Exactly what creates an "undue hardship" depends on the facts of each case. The 503 regulations specify that the following factors can be considered in deciding if a certain accommodation would create an undue hardship for a federal contractor: (1) business necessity, and (2) financial cost and expenses. The Section 504 regulations apply a different set of factors to determine if the accommodation creates an undue hardship for federal recipients: (1) the overall size of the program, (2) the type of program, (3) the nature and cost of the accommodation.[7]

The factors listed in the regulations provide some guidelines, but just what is an "undue hardship" for a certain employer remains unclear. It might be argued that no accommodation that enables an otherwise qualified handicapped person to do the job will create an undue hardship. However, the effect of the undue hardship exception to Sections 503 and 504 has not been decided. It seems that an extreme situation would be necessary to except an employer from the sweeping language of Sections 503 and 504. For example, it might be an undue hardship to make an accommodation that exceeds an employer's yearly budget.

When an employer tries to use "undue hardship" as a justification for not hiring you, you could question his reasoning. You may want to discuss it with him or challenge him through an in-house complaint procedure before you exercise your right to file a complaint with the appropriate government agency. In a complaint procedure, the employer would have to prove that the accommodation would create an undue hardship.

B. EXAMPLES OF REASONABLE ACCOMMODATION

What is a reasonable accommodation for you depends on the job and on your disabling condition. A person who uses a wheelchair who has a typing job may need little or no accommodation to do his work. However, if all of the doorways to his employer's building are located on stairways, he cannot get into the building. On the other hand, a blind person can get into the building, but may require a typewriter with a Braille keyboard and taped assignments to do the job. The reasonable accommodation requirement covers both situations.

1. The Workplace. Facilities which are used by applicants and employees must be accessible to handicapped persons.[8] The wheelchair user cannot even get into the building to apply for the job if the facilities are not accessible. The employer can adapt his facilities to accommodate applicants and employees

who use wheelchairs in a number of ways. For example, (1) by installing ramps as alternatives to stairways, (2) by widening narrow external and internal doorways, (3) by lowering elevator controls, and (4) by modifying water fountains and bathroom facilities as well as in a number of other ways. The employer can also make accommodations for other types of handicaps; for example, by adding Braille symbols to floor designations on elevators and stairwells for use by the sight-impaired.

It is not clear from the regulations if these basic adaptations must be made before the employer hires a handicapped employee. However, a strong argument can be made that any employer who is covered by Sections 503 and 504 should make at least those facilities used by applicants totally accessible immediately.

2. The Equipment. The kinds of accommodation needed for equipment depends completely on the specific person who will be doing the job. It is not a reasonable accommodation for an employer to buy a typewriter with a Braille keyboard for an employee who cannot read Braille and who needs tape-recorded materials.

Modifications of equipment can be very simple or quite complex. One company adapted a computer terminal so that it could be operated by voice by employees who could not use their hands or feet. However, one accommodation might involve a simple, inexpensive adaptation like changing the height of a workbench, a worktable, or a desk. Another might be to provide a reader for a blind employee or an interpreter for a deaf employee. In a case where the person is only partially sight- or hearing-impaired, an adequate accommodation might be to provide special lighting or a telephone with an amplifier.

3. Restructuring the Work Schedules. Suppose that a large furniture company has an opening for a full-time salesclerk to work its day shift. Gwen applies. She used to work in a sales position before she developed cancer. Although she is able to go back to work, she still keeps appointments one morning each week for continued treatments. The company has a contract with the federal government that is worth more than $2500.

Under Section 503, the company cannot discriminate and must take affirmative action toward the handicapped. Gwen's history of cancer has handicapped her in the job market because many employers refused to give her a job solely because of it. Under Section 503 the federal contractor cannot discriminate against Gwen on the basis of this medical record. Furthermore, insofar as Gwen's history is being treated as a handicap, the contractor must treat her as a member of the category of people who can benefit from affirmative action. One way that Gwen's history of cancer actually does handicap her ability to work is in the constraints it places on her schedule. As long as she must go for treatments or a check-up once each week, she cannot work the usual nine to six shift each day.

Under Section 503, the employer cannot automatically reject Gwen because she is unavailable to work every morning of the week. The employer must consider what reasonable accommodation is possible so that Gwen can do the job. There are a few possible alternatives. For example, the employer might attempt to rearrange work schedules. The employer might find an employee from the nightshift who is willing to work one morning a week in exchange for one evening off, and Gwen can work one night;[9] or the employer might split the position and hire someone else to work while Gwen is at the doctor's. In the second case, Gwen might only get a part-time job.

With some jobs it might be possible to rearrange the work schedule of the particular position itself. Suppose that Gwen is also qualified to do office work, and she applies in the alternative for an office job with the company. For this job, most of the work does not have to be done at a certain time of the day, as long as each day's work is finished before the next day. The employer might accommodate this job to Gwen's doctor's appointments by allowing her to work late on the days of her treatments. With this work schedule, Gwen could easily take a full-time position.

4. Restructuring the Job Itself. In another situation, the employer might accommodate a handicap by restructuring the job itself. In order to restructure the job, the employer would analyze the particular position and categorize the duties involved. The analysis might focus on essential and incidental duties or some other breakdown. This might be difficult with a purely sales position. However, suppose that the furniture company has an opening in the administrative office for a clerk-receptionist. Marsha has a hearing-impairment which makes it difficult for her to understand speech, but she is an excellent typist. She applies for the job. Analysis of the position indicates that the job responsibilities are in three categories: typing, telephone messages, and greeting visitors. The employer determines that she can accommodate Marsha's hearing limitations for the telephone responsibilities by having the telephone company install a special amplifier. Then she can restructure the job responsibilities so that Marsha can answer all of the telephone calls or do more of the typing while the other clerk greets all of the visitors.

C. THE IMPORTANCE OF REASONABLE ACCOMMODATION IN YOUR PREPARATION FOR AN INTERVIEW

As you can see from the examples, finding a way to accommodate your handicap can make the difference between being seriously considered for the job and being barely considered, if at all. When you prepare for an interview, consider the possible ways to accommodate your handicap to perform the particular job for which you are applying. This is an important means of personal action by which you can help the employer meet his obligation to you.

The Sections 503 and 504 regulations require the employer to judge whether or not you are "qualified" by considering what you can do when a "reasonable accommodation" is made. Furthermore, the regulations require the employer to make the accommodation. However, the employer might not realize what accommodations are possible. If you can tactfully suggest accommodations, you may increase your chances of getting the job. Your suggestions force the employer to consider alternatives he might have overlooked. Also, by showing that you have sincerely thought about the job, you prove your interest in it.

Before the interview, find out as much as you possibly can about the specific job. Discuss it with people who are interested in your getting a job and whose opinion you respect. Consider together whether or not your handicap poses an obstacle to your doing the job. If you think it might, try to make a list of accommodations that will allow you to do the job.

CHAPTER 4: GETTING HIRED BY A RECIPIENT OF FEDERAL FUNDS FROM HEW:

A CASE STUDY

In the following case study you will find discriminatory actions by an employer against a job applicant who is handicapped for the purposes of Section 504. Following the case study is an analysis of the employer's actions for violations of Section 504 and the HEW regulations. The analysis of the case study illustrates possible analyses. You can use the case study and analysis to help you examine your own job hunting experiences for similar violations of your rights.

A. RECRUITMENT, APPLICATION PROCEDURES, JOB-RELATED REQUIREMENTS, MEDICAL REQUIREMENTS

Tracey is blind.[10] She has a professional certificate from her state education department to teach junior high or high school level social studies. She is interested in teaching in Metropolis, one of the communities in her state.*

A Metropolis School District representative recruited applicants at Tracey's college before she graduated, and she attended the general information meeting even though, at the request of the Metropolis representative, it was held in a building which was one of the least accessible on campus, a former private home with steep entrance staircases. Application forms were distributed at the meeting. With the help of a friend, Tracey completed the application and returned it to the Superintendent of Schools. One set of questions concerned physical disabilities and asked her to explain if she had any impairments of vision, hearing, speech, manual dexterity, or ambulation, and, if so, to what extent she was disabled.

The school district representative said that all teacher applicants in the Metropolis schools must take a written qualifying examination before they will be considered for a position. Applicants are ranked on an eligibility list based on the results of the exam. When their name is reached on the list, they are interviewed and orally asked about areas which could not easily be covered on the written exam.

After she filed her application, Tracey awaited notice of the examination date. Instead, she received a letter telling her that she could not take the exam. The letter explained that blind applicants would not be approved by the school district's physician for teaching sighted students; therefore, they were not allowed to take the exam for assignments in "regular" classes.

The school district receives federal financial assistance from the Department of Health, Education, and Welfare.

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* Section 504 protects any applicant for a position with a federal recipient, not just those applying for professional positions. The teacher example is used because many people are familiar with what a teacher does.

Analysis. At this point we will stop and analyze Tracey's story to determine if she has been discriminated against on the basis of her handicap. As a recipient of HEW funds, the school district must comply with Section 504 and the HEW regulations. If the school district cannot convince Tracey that it did not discriminate, or if it does not resolve the matter to Tracey's satisfaction, perhaps by offering her another position, Tracey will probably file a complaint against the school district with the Office for Civil Rights in HEW (see Chapter 6).

1. The Recruitment Meeting. Discrimination in recruiting is specifically prohibited [84.11(b)(1)]. Nevertheless, the employer's representative requested that the general information meeting be held in a building which he knew was inaccessible to applicants using wheelchairs. Although this location did not present a serious problem for Tracey, it made it impossible for any wheelchair users who were interested to attend the meeting. Any of these applicants could file a complaint with HEW against the employer. (They also have a complaint against the university, if it is an HEW recipient, for not making certain that the meeting was held in an accessible place [84.46(b)]. All HEW recipients must make all of their services accessible and available to all disabled persons who are among those who would normally participate in or benefit from the program or activity.)

2. The Application. The general rule under Section 504 is that the employer cannot request direct information about Tracey's handicap or the severity of it [84.14(a)]. Therefore, the questions on the application about handicaps illegally discriminate against her. However, it would have been okay for the employer to ask Tracey about her ability to do activities that are job-related. For example, suppose that, instead of asking if Tracey had any handicaps, the question asks if Tracey is able to use audio-visual equipment and requires her to explain her answer. Tracey might answer "no," and then explain that her reason for not being able to use the equipment is her visual handicap and that she needs accommodation to perform that task. Even though Tracey has to mention her handicap to answer this question truthfully, the question is not discriminatory. The distinction between the questions is that when the employer asks about handicaps, he implies that it will affect his decision regardless of what effect the handicap has on the applicant's ability to do the job. However, when he asks about the applicant's ability to do a job-related task, he is asking for information that is legitimately needed for his decision. Tracey might argue that being able to use audio-visual equipment is not an essential part of a teacher's job or that she is qualified for the job with accommodation. In any event, the employer has a responsibility to consider a reasonable accommodation of Tracey's handicap to meet this requirement.

When the employer is required to take or is voluntarily taking affirmative steps to overcome the effects of prior discrimination against the handicapped, an exception is made to the general rule prohibiting direct questions about the applicant's handicapping conditions. In these cases the application may include a direct question about handicaps. Similar direct questions are also allowed under Section 503. The rationale for the exception is that affirmative steps cannot be taken unless the employer knows who is handicapped. However, the applicant cannot be compelled to answer such questions. A question that directly asks about handicapping conditions must be accompanied by a notice that explains (1) the reason for requesting the information, that is, that the employer is required to take affirmative action or that he is taking voluntary action to benefit the handicapped; (2) that the information is voluntary; and (3) that it will be kept confidential. After an applicant is hired, three exceptions may be made to the requirement of confidentiality: supervisors and managers, the first aid and safety staff, and government officials who are investigating the employer's compliance with the regulations may be advised of the employee's handicap.

3. The Rejection Letter.

a. Requirements that are Job Related -- The general rule under the HEW regulations prohibits the employer from using a basis for selecting an applicant which automatically excludes qualified handicapped persons. According to this rule, the school district could not have a blanket requirement that its employees be sighted unless sight is job related and there is no other basis which the school district can use which has a less negative effect on qualified applicants who are blind [84.13(a)]. In either alternative, sight would not be an essential requirement for the job. According to the HEW regulations, for a handicapped person to be "qualified," he or she must be able to do the essential functions.

In the letter which notifies Tracey that she is ineligible to take the exam because she is blind, the superintendent is actually saying that "sight" is an essential job requirement for anyone who wants to teach sighted students.

Suppose that the superintendent's reasons for saying that sight is an essential job-related requirement are that a teacher of sighted students needs sight (1) to keep up with the reading pace of her students, (2) to keep proper class records, (3) to evaluate written work, and (4) to do extra duties, such as supervise the cafeteria. One way for Tracey to show that sight is not an essential qualification for successful teaching is to show that these teaching duties can be accomplished without sight. For example, by using Braille, the teacher can keep up with the reading. By keeping daily records in Braille or tape recording them, the teacher can keep her records current. For official files, she can transcribe the information, for example, by typewriter. By using another person as a reader, Tracey can evaluate papers. Such a person might be a student or someone from outside the school. (In an administrative challenge, discussed in Chapter 6, the Office for Civil Rights, Department of Health, Education, and Welfare, is responsible for showing that there are alternatives to the criticized requirement [84.13(a)].

The superintendent's fourth reason was that a vision-impaired teacher would not be able to do extra duties. Although extra duties, such as supervising the cafeteria, might be challenged as not being a part of a teacher's essential job, with accommodation Tracey can probably take one of the extra duties expected of the teaching staff. As an alternative, she might be given one of the jobs that does not depend on sight.

The alternative ways for Tracey to demonstrate her abilities involve reasonable accommodations to her handicap. Under Section 504, unless it causes undue hardship on the educational function of the school, the school district must be willing to make reasonable accommodations. In addition, the superintendent must consider the possible accommodations when he evaluates Tracey's qualifications. (The employer's obligation to make a reasonable accommodation is discussed in Chapter 3.)

The combined effect of requiring the employer to use only job-related requirements and to consider the possible effects of reasonable accommodations to Tracey's handicap, makes him concentrate more on Tracey's other qualifications. He is compelled to look more at what she can do rather than at what she cannot do.

b. Medical Requirements -- The superintendent's letter implied that Tracey would be required to have a medical examination if she were offered a job. It may surprise you to learn that the HEW regulations do not prohibit such an examination. However, when an examination is required, it must be done after an offer of employment has been made and it must be given to all entering employees [84.14(c)]. The regulations state thate the information learned in the examination cannot be used in an illegal way. For example, suppose that someone is offered a job, and, during the course of the medical examination, she reveals that she was treated for a mental illness at a prior time. It is illegal discrimination if the job offer is withdrawn because of this past history. However, suppose someone is offered a job to drive a school bus and the exam indicates that he or she has impaired vision. It is not illegal for this offer to be withdrawn.

B. TESTS

Suppose that Tracey was given permission to take the examination. After the letter arrived to notify her of the date of the exam, she immediately notified the examiners that she was blind and would need a Brailled version of the exam or someone to read the exam to her. However, when she arrived for the test, she was told that no special arrangements were made and that none would be.

Analysis. The HEW regulations require an employer to adapt his tests to accommodate an applicant's sensory, manual, or speaking disability. The only time an exception is possible is when the test is intended to measure the skill that is handicapped [84.13(b)]. By not making arrangements so that Tracey can take the exam, the school district is discriminating against her. Withiout the special arrangements, the test is as impossible for Tracey to take as if the school district continued to refuse to let her take it.

C. EVALUATION OF QUALIFICATIONS -- INTERVIEWS

Suppose that the exam was printed in Braille and that Tracey takes it. Based on the results of the written test alone, her name is placed in the top 50% of the eligibility list. When job openings occur, the superintendent uses this list of applicants to determine which ones will be interviewed.

During the interview, applicants are typically asked about their teaching objectives, their student teaching experiences, their abilities to cope with stress, to relate to others, and to deal with students. However, in Tracey's interview, most of the questions concern how a blind teacher can do certain things, such as teach reading or poetry, or operate equipment. When the usual topics are discussed, the questions also are specifically about a blind teacher's abilities.

When they evaluate Tracey as a potential teacher, the interviewers criticize her failure to explain her teaching objectives or to discuss the usual topics more fully than she did. Furthermore, they expressed doubt that she can maintain discipline or grade written work without help, or that she can respond quickly to classroom situations, keep up with the workload, or maintain proper records. Based on these observations, the interviewers recommend that Tracey not be hired.

Analysis. The HEW regulations prohibit discrimination on the basis of handicap in processing applications [84.11(b)], and an interview is one step in that process. In addition, the employer is required "to make all decisions concerning employment...in a manner which ensures that discrimination on the basis of handicap does not occur..." [84.11(a)(3)]. However, the types of questions asked and the evaluations of the interviewers are evidence that there was bias against Tracey because of her handicap. As a result, their decision not to recommend her for hiring may be a discriminatory one.

In order to determine if a handicapped applicant is qualified, the employer must evaluate what the person will be able to do when a reasonable accommodation has been made to the handicap. (See [84.3(k)(1)], [84.12(a)]; reasonable accommodation is discussed in Chapter 3.) The two interviewers did not discuss the possibility of any accommodations with Tracey, and their written reports do not indicate that they considered any. The fact that there are at least 400 blind teachers of sighted students in this country[11] is evidence that accommodations are possible.

Although it is relevant for the interviewers to determine that Tracey can perform job-related functions, in doing so, they must consider the possible alternatives to the usual way of doing a certain task. By not doing so here, they discriminated against Tracey on the basis of her handicap.

D. FINAL SELECTION

Suppose that Tracey made it through all of the steps of the application process and that she is one of the final three candidates for a specific opening. When the selection is made, the superintendent hires one of the two other candidates.

Analysis. The HEW regulations require that the employer not discriminate in selecting which applicant to hire [84.11(a)]. When a qualified handicapped applicant is not hired, it is not automatic evidence of discrimination. More facts must be learned.

Although Tracey was included in the final group of candidates, this might only be to cover up actual discrimination. Evidence of discrimination in any of the previous recruitment or application steps, such as the examples already discussed, strongly indicates a discriminatory influence on the final selection.

Comparing Tracey's qualifications, especially her education, scholastic achievement, recommendations, and performance on the written test, with those of the person hired can also indicate possible discrimination. In the event that Tracey is the best qualified candidate, the evidence is strong that the employer discriminated. If she is only equally as qualified, discrimination in the selection alone is more difficult to prove. In the event that she is not as qualified, it is very difficult to prove that discrimination was involved in the final choice.

E. EFFECT OF COLLECTIVE BARGAINING AGREEMENTS, STATE AND LOCAL LAWS, AND EMPLOYMENT OPPORTUNITIES

Suppose that the superintendent told Tracey that the reason he refused to hire her, or the reason that he refused to consider her application, was that, by hiring her, he would have broken a state or local law or a term of a collective bargaining agreement. Or else, suppose that he said his reason was that there were so few job opportunities available for social studies teachers, he thought he did not have to comply with Section 504.

Analysis. Section 504 specifically provides that none of the following laws, contract terms, or situations lessen or eliminate the employer's obligations to you under Section 504: state or local laws [84.10(a)], terms of a collective bargaining agreement [84.11(c)], or the number of employment opportunities available in the particular occupation or profession [84.10(b)] In other words, when the rest of the evidence adds up to discrimination, none of these reasons will excuse the employer's illegal actions.

under Section 504, but similar to the exceptions for voluntary action and affirmative steps to be taken under that Section.) In addition, the employer must invite all applicants who believe they are covered by the law to identify themselves if they want to benefit from the affirmative action program. The invitation must say that you can give the information voluntarily and that it will be kept confidential, unless you are hired. Once you are hired, it may be necessary to tell supervisors and managers, first aid and safety personnel, or government officials investigating the employer's compliance. The invitation must also say that whatever information you give will only be used to comply with Section 503. If an employer uses that information to discriminate against you, it is a violation of Section 503.

One of the questions on the XYZ Company's application form asks Craig if he has any physical or mental disabilities or illnesses, and, if so, to what extent he is handicapped. The application does not include any explanation that the company intends to use the information in any special manner.

Analysis. Although the XYZ Company needs information about handicaps to meet its obligation to take affirmative action, the above question is illegal. The question is not stated as an invitation, and it does not include any explanation of the reason the information is requested nor of how it will be used. Moreover, the way that the question is stated makes it sound as if Craig has no choice but to answer the question. This is also illegal, because identification of handicaps must be voluntary. On the other hand, the questions would be okay if the invitation form was used and the proper information about Section 503 given.

C. THE REJECTION LETTER

1. Requirements that are Job Related. At some point in the application process, Craig receives a letter telling him that he is not eligible for further consideration because the company will not hire as a service representative anyone who uses a wheelchair.

Analysis. Under Section 503 regulations, the XYZ Company cannot legally require that applicants be able to walk unless the requirement is (1) job related, (2) necessary for the operation of the business, and (3) necessary for the safe performance of the job [60-741.6(c)(2)]. Requirements that do not satisfy each of these three factors are discriminatory and indicate that the company is failing to take affirmative action.

Suppose that the employer says that the reason that service representatives must be able to walk is that a person who uses a wheelchair cannot service or operate the equipment safely. This reason cannot stand up to a challenge. Craig has evidence from his training program that he can work safely with the machines. In the event that Craig files an administrative complaint against the employer (see Chapter 6), this evidence can be used against the employer.[12]

Moreover, XYZ Company has an obligation to make reasonable accommodation to Craig's handicap and must take that into consideration in deciding if he is qualified. Under Section 503, XYZ must make a reasonable accommodation to Craig's handicap, unless that will place an undue hardship on the conduct of its business. (The employer's obligation to make a reasonable accommodation is discussed in Chapter 3.)

By compelling the employer to focus on qualifications that are truly job related and to accommodate handicaps, the regulations force him to consider Craig's ability for the job rather than his disability.

2. Medical Requirements. The Section 503 regulations allow an employer to conduct a comprehensive medical examination of a prospective employee prior to employment [60-741.6(c)(3)]. However, any information gained about a handicap must be used for the purpose of taking affirmative action and determining necessary accommodations. In no case can it be used to discriminate against the handicapped person.

Suppose that you have an invisible "handicap," for example, a prior history of mental illness. Suppose that you apply for a job that you think you are qualified for. The employer offers you the job and says that all new employees must have a physical for insurance purposes. Shortly afterwards, the employer tells you that the company has reconsidered the position and is not hiring at this time. That decision could be challenged. Perhaps the company did reconsider, but there is a chance that they are discriminating against you.

D. TESTS

Under the Section 503 regulations, written tests, just as all criteria for hiring, cannot be used by the employer to exclude a person just because he is handicapped [60-741.6(c)(2)]. Any abilities tested which are used as the basis for exclusion must be abilities that are demanded by the specific job, by business necessity, or by safety considerations.

A requirement that is implicit in these regulations is that any tests must be given in a location which is accessible to all handicapped persons. This requirement arises from the contractor's joint obligation not to discriminate in any and to take affirmative action in all employment practices.

Suppose that XYZ Company requires applicants to demonstrate their ability to work with the machines. This is done during a test which is part written and part skills. One part of the test requires them to carry several pieces of heavy machinery, although on the actual job the equipment is delivered and carried in by another employee. When Craig takes the test, he is unable to carry in the equipment and he cannot complete that part of the test. As a result of skipping part of the exam, Craig scores low and is excluded from further consideration.

Analysis. The employer violates Section 503 by requiring Craig to demonstrate an ability -- to carry the equipment -- that is not necessary for doing the specific job, for purposes of business necessity, or for safety.

E. EVALUATION OF QUALIFICATIONS -- INTERVIEW

Before Craig went for his interview, he spoke to a number of persons who did similar work to the job for which he applied. He found out as much as he could about the types of questions that the interviewers usually asked. However, at Craig's interview, the interviewer asked only questions about Craig's ability to perform the job with his handicap. By the end of the appointment, Craig suspected that the interviewer had gained little knowledge about Craig's ability to do the job.

Analysis. Section 503 requires the employer to follow procedures which carefully, thoroughly, and systematically evaluate job qualifications [741.6(b)]. In this interview, XYZ Company failed to comply with the regulation. By focusing exclusively on Craig's handicap in relation to the job, the interviewer showed little interest in thoroughly or systematically evaluating Craig's qualifications.

F. FINAL SELECTION

Suppose that Craig's application proceeds smoothly through the employer's requirements. The interview goes well. He scores high on the examination. Everything looks good. He is among the "finalists" for the job; however, one of the others is hired.

Analysis. The employer's obligation not to discriminate and to take affirmative action [60-74.4(a)] extends to every employment practice, including the final selection of whom to hire. Nevertheless, when a qualified handicapped applicant is not hired, that is not automatic evidence of discrimination. More information is needed.

Evidence of discrimination in any of the previous recruitment or application steps, such as the examples already discussed, strongly indicates a discriminatory influence on the final selection. Even without evidence of prior discrimination, it is possible to find that the employer discriminated or failed to take affirmative action in the final selection itself. In the event that Craig is the best qualified, but the employer hires someone else, that is strong evidence in itself that the employer discriminated against Craig.

G. EFFECT OF COLLECTIVE BARGAINING AGREEMENTS

Suppose that XYZ Company did not hire Craig, and the personnel officer said that the reason was that, by hiring him, the company would have to break the terms of its collective bargaining agreement.

Analysis. Section 503 requires the employer to notify each organization with which it has a collective bargaining agreement of its obligation under Section 503 [60-741.4(e)]. It appears as if the collective bargaining agreement does not validly excuse the employer from his obligation to comply.[13]

CHAPTER 6: ADMINISTRATIVE COMPLAINT PROCEDURES -- ENFORCING SECTIONS 503 and 504

INTRODUCTION

As stated in Chapter 1, working through a legal procedure usually takes time and money and often requires courage. Therefore, you will probably want to protect your rights without taking any formal legal action if that is possible, even though personal action may also require a certain courageousness.

In some circumstances you may be able to suggest reasonable accommodations to the employer and so promote his compliance with the law. In others, you may be able to show the employer that he is violating the law and persuade him to correct his actions with regard to you or to explain them to your satisfaction. Whether you act on your own in these situations and how you do so will depend, to some extent, on your personality and on how comfortable you feel being your own advocate. Whenever you do discuss your rights with the employer or your expectations of what he must do to comply with the law, be careful not to compromise your right to further action if a resolution cannot be worked out or if it is not followed through.

When your personal approaches are not successful, you may then want to turn to the administrative procedures provided by the respective enforcement bodies, the Office of Federal Contract Compliance Programs of the Department of Labor for Section 503 or the Office for Civil Rights of the Department of Health, Education, and Welfare for Section 504. These procedures seek to benefit you to the extent that they can force the employer to comply with the law. Beyond that point, they seek to penalize the employer for his noncompliance. If the procedures are successful for you, the remedy will be to gain for you, probably in money or position, what you lost by the employer's noncompliance, for example, backpay, a particular job, seniority.

A. ENFORCING SECTION 503

When you think that an employer has failed or refuses to comply with his obligations to you under Section 503, and that your own attempts to correct the situation have failed, you should consider filing a complaint against him with the Office of Federal Contract Compliance Programs of the Department of Labor. Your complaint initiates an administrative proceeding which is conducted by the Department of Labor or by another federal agency which is designated by the Department of Labor. Your first step is to file a complaint with the regional Office of Federal Contract Compliance Programs. (Addresses of the regional offices are listed in Appendix A.)

The Department of Labor must then "promptly investigate" and act on the basis of the specific facts and circumstances [60-741.26(e)]. If the Department of Labor assigns your case to another federal agency, your contact will be with that other agency. However, the basic procedure, which is described below, remains the same.

1. Filing the Complaint [60-741.26] A complaint may be filed by you directly or by your authorized representative. An authorized representative may be a lawyer or a union representative. Generally, you must file no later than 180 calendar days from the date of the alleged violation. The time-limit will be extended in some circumstances, but it is best to file before the deadline. If you file your complaint promptly, the investigators will be able to evaluate the facts of your case while they are relatively fresh. The later you wait, the more difficult it will be for them to discover what really happened, especially if it is necessary for them to interview people. Any time you do get an extension, be sure to request that it be put in writing and that a copy be sent to you.

There is no special form which you must use for the complaint itself. You may initiate the complaint by a letter, telephone call, or personal visit to the Office of Federal Contract Compliance Programs in your region. (See Appendix A.) However, before official action is taken, the complaint has to be put in writing and you or your authorized representative must sign and date it. The complaint must contain the following information:[14]

1. your name, address, and telephone number,
2. the name and address of the employer who committed the alleged violation,
3. a description of the act or events which you thought violated Section 503,
4. either a signed statement that you are handicapped or that you have a history of a handicap, or some other documentation that you are handicapped or that the employer treated you as if you had a handicap,
5. any other available information which you think is pertinent and which will assist in the investigation and the resolution of your complaint, including the name of any federal agency with which you know the employer has contracted [60-741.26(c)].

You will be requested to supply any information which you do not include. Send the requested information within sixty days or the case may be closed. (The days are counted from the date of the request.)

2. Referral to Employer. Whenever the employer provides his own review procedure to hear complaints such as yours, such as a grievance procedure, the complaint is referred back to him for processing. Such a procedure must resolve the complaint to your satisfaction within 60 days of the referral or the Department of Labor will commence the administrative procedure. However, in most employment situations it is unlikely that the employer's procedures are available to an applicant.

You may choose to have the employer's procedure stopped at any time that you are either satisfied with the result or that you do not see the possibility of a satisfactory resolution. Notify the government employee, or at least the office, that is handling your complaint.

The employer is required to keep the complaint confidential and all actions taken with regard to it [60-741.26(b)]. Requirements of confidentiality safeguard your privacy and also protect you from possible retaliations.

3. Government Investigation. The Department of Labor investigates your complaint after any of the following events, whichever occurs first:

- -- you file a complaint, and the employer has no procedure for hearing it (or, none which applies to you),
- -- the employer's procedure does not reach a resolution satisfactory to you,
- -- the sixty-day period allowed for the employer's procedures ends without a resolution.

The investigators attempt to identify as much evidence as possible with regard to your charges against the employer. In addition, the investigators will recommend a resolution [60-741.26(e)].

4. Resolution. The investigation of your complaint will lead to one of three possible resolutions: (1) the complaint will be suspended, (2) the Department of Labor (actually the Office of Federal Contract Compliance Programs) will attempt to resolve it informally, or (3) formal procedures will be initiated against the employer.

a. Complaint Procedure Suspended -- The Department of Labor can decide to drop the complaint procedure after the investigation if (1) the official investigation of the complaint does not reveal a violation of Section 503, or (2) the Office of Federal Contract Compliance Programs decides not to initiate proceedings against the employer (neither within the department nor in court). The Department of Labor must notify you if it plans to suspend the procedure. In this case, DOL will not take further action on your complaint. You must request a review of the finding or of the decision by the Director within thirty days of the date of the notice if you still want to press for action by the Office of Federal Contract Compliance Programs [60-741.26(g)(1)].

b. Conciliation and Persuasion -- When the investigation turns up a violation of Section 503, the Department of Labor informally attempts to make the employer comply, by using "conciliation" and "persuasion." "Conciliation" involves having the Department of Labor act as a mediator between you and the employer, trying to come up with a solution that is satisfactory to you. By "persuasion" the Department tries to convince the employer that he should comply with the law voluntarily. These informal procedures must be completed within a "reasonable" time. No specific time limit is provided.

For the Department to find that the employer has complied with the law and is no longer in violation of it, the employer must make a specific written commitment to take "corrective action" that will benefit you. This action must comply with the non-discrimination and affirmative action provisions of Section 503. Moreover, it must be approved by the Director of the Office of Federal Contract Compliance Programs [60-741.26(g)(2)].

"Corrective action" is whatever is necessary and realistic to correct the wrong which has been done to you. For example, the employer might agree to place you in the next available opening, or to give you an alternative position at similar pay, or to pay you back wages, or to take some other action.[15]

The employer must take corrective action within the minimum time necessary for making the arrangements.

c. Formal Procedures. When a violation is found, but the informal methods of conciliation and persuasion are not successful, the Director of the Office of Federal Contract Compliance Programs may choose to take formal court action or to apply administrative sanctions against the employer.

The Director initiates consideration of a court action by forwarding all of the information about and records of the case to the Solicitor of Labor [60-741.28(b)]. The decision of whether or not to go to court is then up to the Solicitor. A court action can benefit the handicapped complainant; for example, the court could find that the employer should have hired you as of a certain date and that the employer now owes you backpay as well as a job. The same kinds of results should be available here for your benefit as through the "corrective action" discussed above, namely, backpay, placement in the next available position, or whatever other remedy is necessary to correct the wrong done you.

Instead of a court action, the Director can choose to penalize the employer, administratively. Although the administrative penalties are not directly beneficial to you, the threat of such sanctions may prod the employer to take an action which would benefit you. The three possible sanctions are: (1) payments owed to the employer on the contract may be withheld, (2) the contract may be totally or partially terminated, (3) the employer may be debarred from receiving any future contracts until he complies and is reinstated [60-741.28; 60-741.50].

5. Further Action and Related Concerns. Please see this chapter, subpart C.

B. ENFORCING SECTION 504

The steps you take to protect your rights under Section 504 are similar to those described for Section 503. When you think that an employer has discriminated against you in violation of Section 504, you should consider filing a complaint against him with the Office for Civil Rights of the Department of Health, Education, and Welfare. Employees of an HEW recipient who employs fifteen or more persons will also have access to a grievance procedure established by the employer to consider Section 504 complaints [84.7(b)]. This procedure does not have to be available to applicants for employment and an employee is not compelled to use it. However, the grievance procedure can be used simultaneously with the HEW procedures (unlike the in-house procedures under Section 503 which must precede DOL action) and it probably will be completed more quickly.

1. Filing the Complaint. You may file the complaint yourself or through an authorized representative such as an attorney or a union representative. You

file the complaint by writing to the Office for Civil Rights, Department of Health, Education, and Welfare in your region. (See Appendix B.) Include the following information:[16]

1. your name, address, and telephone number,
2. the name and address of the employer who committed the alleged violation,
3. a description of the act or events which you thought violated Section 504,
4. either a signed statement that you are handicapped or that you have a history of a handicap, or some other documentation that you are handicapped or that the employer treated you as if you had a handicap,
5. any other available information which you think is pertinent and which will assist in the investigation and the resolution of your complaint.

You must file no later than 180 days after the date of the discriminatory incident, although sometimes when you have a good enough reason you can get an extension. Be sure to request that any extension be put in writing and that a copy of it be sent to you. It may be to your advantage to file promptly because that gives the investigators an opportunity to investigate your complaint while it is relatively fresh. This is especially important when it is necessary for them to interview people.

2. Government Investigation. HEW assigns an official to make a prompt investigation to determine if the employer did violate Section 504 [45 C.F.R. 80.7(c)(1975)]. The regulation does not define "prompt." In one court case, one and one-half years was judged to be too long.[17] The investigation determines if the employer illegally discriminated against you.

3. Resolution

a. Informal Mediation -- When illegal discrimination is found, the HEW official tries to persuade the employer to comply with the law. At first, he uses informal means such as mediating between you and the employer; in other words, he acts as a go-between [80.7(d)(1)].

b. Formal Procedures -- When the discrimination is not corrected by informal means, HEW may choose a formal method of enforcement. Three specific sanctions are possible: (1) suspension of federal financial assistance to the recipient (that is, the employer), (2) termination of the assistance, or (3) refusal to grant or continue the assistance [80.8(a)]. None of these sanctions directly benefit the handicapped complainant (that is, the person who made the complaint), however, the mere threat of having financial assistance disrupted may be enough to convince the employer he should comply with the law.[18] In addition, HEW may take any other authorized legal action, such as recommending that the Department of Justice file a court action against the employer [80.8(a), also see 80.8(d)].

c. Complaint Procedure Suspended -- When the investigation does not reveal illegal discrimination, HEW must notify both you and the employer in writing [80.7(d)(2)]. In this case, HEW will not take further action on your complaint.

4. Further Action and Related Concerns. Please see this chapter, subpart C.

C. FURTHER ACTION AND RELATED CONCERNS FOR BOTH SECTIONS 503 AND 504

1. Retaliations [60-741.51; 80.7(e)] You have a right to participate in any activities related to the administration of Section 503 or Section 504 without suffering any retaliation from the employer or anyone else. This protection extends to filing a complaint, furnishing information for or assisting in an investigation or hearing, or any other activities. Examples of retaliatory actions are intimidation, threats, coercion, or discrimination for the purpose of interfering with your actions in connection with either Section 503 or Section 504.

If a federal contractor fails to take whatever steps are necessary to prevent retaliation against you, any of the administrative sanctions discussed in subpart A can be used to penalize him. The Section 504 regulations are not so specific in stating what can be done to an HEW recipient who fails to prevent retaliation. However, it seems that the sanctions discussed in subpart B should be applied.

Whenever you think that you are the victim of retaliation, immediately notify the government employee, or the office, which is processing the original complaint.

2. Hearings. In certain circumstances, the employer has a right to request a hearing on your complaint. For example, under both Sections 503 and 504, the employer can ask for a hearing when administrative sanctions have been proposed for application against him [60-741.29; 80.8(c)]. In this case, you may be asked to participate in the hearing. It is reasonable for you to cooperate with this request; however, you may wish to discuss it with your attorney.

3. Court Action. The final action taken by HEW or the Department of Labor is not the last step possible. If you are dissatisfied with the results of the administrative procedure, speak to an attorney about the possibility of filing a lawsuit in federal court. He will be able to assess your situation, whether or not there is a legal basis for a suit, and the prospects for success.[19]

40

PART II: POST-HIRING PRACTICES

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INTRODUCTION

The employment situation involves many other employment practices which come into play once the employer has made the decision to hire a particular employee. The employee will ask: "Where will I be placed?" "Will I be trained?" "What kind of compensation will I receive during training?" "How will I advance in the company?" "For what reasons can I be laid off or terminated?" This section of the handbook will explore answers to these questions for the emotionally, mentally or physically disabled employee of an employer who is covered by the regulations. This section will examine possibly discriminatory situations on the basis of two underlying questions:
1) Is the handicapped person being treated differently from other employees?
2) If so, is this different treatment based on discrimination?

CHAPTER 7: PLACEMENT PRACTICES

A. OVERVIEW

Sections 503 and 504 of the Rehabilitation Act bar discrimination in placing or in assigning work to a handicapped employee.[20] Section 503 requires employers to take affirmative action steps to counsel and to promote handicapped employees.[21]

The key concepts you should have in mind when placed in a new job or given work assignments are:

1. The skills of the worker should be matched to the essential requirements of a job.

2. Incidental duties should be switched if the worker is physically or mentally unable to perform them.

3. Your skills and aptitudes should be maximized through "reasonable accommodation."

4. The job should offer opportunities for advancement.

5. Continued career counseling should be sought by the employee and made available by the employer.

B. ENTRY-LEVEL POSITIONS

Initial placement in entry-level positions may be necessary in order to give the disabled employee experience in the new job and with the company or agency. Placement of a handicapped worker may require "reasonable accommodation" to enable him or her to perform the essential duties of the job. Restructuring a job is one way in which an employer may create an entry-level job for a handicapped worker which does not focus on physical or mental abilities. In job restructuring, the entry-level work is broken down into a number of separate tasks. Those demanding physical or mental skills that the handicapped worker does not possess can be shifted to other employees. The handicapped worker takes on more tasks that he or she can do.

The handicapped worker has traditionally been denied or limited in employment possibilities, and may, therefore, lack certain experience qualifications and skill levels. Thus, initial placement in entry-level jobs may be necessary. However, as experience is gained and the tasks become fairly routine, the handicapped worker, in requesting reassignment, should seek movement to more highly skilled jobs. Stress to the employer your motivation and a record of good work where you do not yet possess quite enough experience, educational qualifications, or skill level of the higher jobs.

C. DEAD-END JOBS

The disabled employee must guard against misplacement into a "dead-end" job that offers no advancement possibilities. A primary question that should be asked when you are assigned is: What are the opportunities for advancement into skilled, supervisory, or executive positions?

Finally, it is unlawful to give handicapped employees a disproportionately large share of dirtier jobs, less favorable hours, or low skill jobs.

D. "GHETTOS"

It is unlawful to maintain separate job classifications or job lines for handicapped workers. Likewise, it is discriminatory to earmark a certain job for handicapped employees only, so that all the disabled workers in the company or agency are "ghettoized" into this one job category.[22] Generally such jobs will involve routine tasks requiring few skills and little responsibility.

The employer may intend to keep handicapped workers out of other departments, or he may just believe he is helping handicapped workers by giving them "light" physical tasks and jobs that don't require specific skills. The impact, however, is to segregate and stagnate the worker with a disability. It avoids the employer's obligation to hire and advance the handicapped worker by making reasonable accommodation. In placing the disabled worker, both the employee and supervisors must avoid thinking in terms of what the handicapped employee is presently *unable* to do and must focus on the worker's potential, and how the workers' abilities can be maximized.[23]

CHAPTER 8: TRAINING OPPORTUNITIES

A. OVERVIEW

Selection into a training program involves considerations similar to pre-employment testing. You should ask: What mental skills are actually necessary to accomplish the tasks? What physical skills are necessary? Should my handicap disqualify me or can an accommodation be made?

If your employer is subject to the 503 or 504 regulations and provides on-the-job training to all newly hired employees, then you are entitled to utilize that training program equally. You may, in addition, expect "reasonable accommodation" to be made for your handicap to insure that you can benefit equally from the company's program.

Further, an employer may not discriminate, and may not participate in a contractual or other relationship with any other party who discriminates in training or apprenticeship programs.[24] "Reasonable accommodation" concepts apply to these programs. Just as in any other employment situation, the selection and placement criteria in apprenticeship programs should be evaluated for job-relatedness.

If your employer offers other training or educational opportunities, these must be made equally available to you.[25] "Reasonable accommodation" must be made for your disability, if necessary, to insure equal participation.

Some companies offer remedial courses to upgrade employees' knowledge of reading, math, and verbal skills. Conferences and lectures may be available to expand your knowledge of the field. If leaves of absence to pursue further training are available, such programs generally should not result in any loss of employment benefits or in seniority rights.[26]

Persons with disabilities will have varying needs at the training stage. Here are some of the common problems faced and adaptations needed:

* Wheelchair users -- Accessibility of the training room, lunch rooms, bathrooms; access to upper stories of a training building by elevator when necessary; transfering programs to accessible classrooms.

* Deaf persons -- May require an interpreter or individualized instruction.

* Blind persons -- May require a guide in unfamiliar areas; a reader; materials printed in Braille; Braille type on machine; may require markings in the buildings to identify locations of restrooms, elevators, training rooms.

  Individual adaptive devices may be needed to permit full use of training materials for the handicapped person.

  Class hours should be geared for the benefit of all, as well as the handicapped person, to avoid excess travel and time.

  DVR counselors may be contacted to resolve difficulties in regard to necessary adaptive equipment or devices or to refer you to others who may provide technical assistance.

B. CASE STUDY: ON-THE-JOB TRAINING

1. Facts: Sharon is a quadriplegic who is confined to a wheelchair. She has been hired as a computer programmer in a large company. The company has its own special entry and retrieval system which is taught to new employees during a one-month training session. Sharon has minimal use of her hands and uses electrical assistive devices on them to allow her to perform the programming functions. The training sessions are conducted in a building adjacent to the plant. On the first day, the instructor hands out pages of material and booklets for the twenty-five trainees and begins to lecture rapidly. Everyone is scribbling frantically to keep up, except Sharon whose arms will not function quickly enough to enable her to write at such a pace, or for any extensive period of time.

The final two weeks of the month-long course will involve application of the skills the trainees have learned in actual practice with computers. In order to eventually work as a programmer, Sharon will need some minor adaptive devices for her hands to enable her to reach and push the keys on the terminal.

2. Analysis: At this point, we will focus on the problems Sharon is encountering in the class and the best method of resolving them. The company may suggest individualized training at a separate time. If the difficulties in adapting to Sharon's needs are impossible, expose Sharon to humiliation or failure, or are an "undue hardship" on the employer or other employees involved in the course making it extremely difficult to conduct the class, then perhaps separate training should be considered. However, separate training should be considered only if the training format cannot reasonably be accommodated to the trainee's needs, because it perpetuates the stereotypes which create discrimination.[27]

a. Physical location of the building -- Sharon may be required to push her wheelchair to get to the classroom for long distances between buildings. If this is too difficult for her, it may instead be possible to arrange for Sharon to have a parking place reserved next to the training building so that she can drive her van, if she has one, from the main parking lot to a space close to the building. Another suggestion is to ask for someone to assist her in traveling, or for the employer to assign her an aide during those periods that she needs assistance.

b. Materials -- The papers and books used in the class training are very burdensome for a person whose hands move slowly or awkwardly. Reorganization is needed to enable Sharon to keep her materials in order and to allow her to refer to them easily. The instructor, the employment counselor, and possibly the Department of Vocational Rehabilitation in Sharon's area can resolve these difficulties to insure her ability to participate fully in the training program. The papers could be placed in folders and tabbed so that Sharon can turn to the necessary page. The heavy book could be photocopied in sections and placed in a similar indexed folder. A lap board or desk is vital to enable Sharon to take notes.

c. Pace of lecture -- The pace of the lecture prevents Sharon from fully joining in the class because, even though her mental capabilities are equal to any of the trainees, she cannot write fast enough, and she is prevented from recording the lecturer's comments. The lecturer should be requested to slow down. This would benefit not only Sharon, but the other trainees as well. Perhaps self-pacing programs might be instituted which would allow each student to work at his or her own pace. Additional aid may be required, however. Perhaps a tape recorder would enable Sharon to concentrate on the lectures and review the course material at night. Don't be shy about requesting these aids.

d. Application of training -- The final two weeks of the course will involve training work with the computer. Therefore, Sharon will need to be able to function with the machinery as she will in the actual work situation. The need for assistive devices should be anticipated early in order for Sharon to commence her training practice with the rest of the class and will not be delayed waiting for an assistive device to be made for her. As soon as possible after hiring she should request to examine the work place with her supervisor or other company personnel and perhaps an occupational therapist to determine her need for any devices to help her function in her work setting. Any assistive devices should be in place during the second phase of training.

CHAPTER 9: RATES OF PAY

A. OVERVIEW

The anti-discrimination provisions of Sections 503 and 504 apply as well to monetary compensation. Under the regulations, an employer may not pay lower wages or other compensation to the handicapped person than that paid to a non-handicapped employee for similar work on jobs whose performance requires similar skill and responsibility.[28]

This section will explore these concepts of "similar work" and "similar skill and responsibility" to aid you in determining whether a present wage difference is discriminatory.

In making a determination of "equality" of jobs, insubstantial differences in skill, effort and responsibility are generally ignored. The only instance in which different wages are justified is where two jobs are "significantly different" or "substantially unequal." Obviously, the use of such terms creates a very ambiguous definition of what is meant by "similar work" and "significant difference" for both employers and employees.

Determination of similarity is made by judging the actual work performance involved rather than by job classifications or titles. The full job cycle must be considered rather than one particular task. While such job evaluation is complex, there are methods by which you may determine similarity and difference. One such method of job evaluation is the "Kress method": each job is broken down into three components: (1) SKILL, (2) EFFORT, (3) RESPONSIBILITY. Then each of these areas is broken down into further measurements:

(1) SKILL -- the skill required to perform job may be measured by (a) the scholastic content of the job, and (b) the learning period necessary to perform the job;

(2) EFFORT -- the effort necessary to job performance may be measured by (a) mental application, and (b) physical exertion;

(3) RESPONSIBILITY -- the responsibility involved in a job may be measured by (a) the degree to which work is supervised, (b) teamwork and public contact required, (c) the seriousness of task errors, (d) the originality of problems the worker encounters, (e) additional duties imposed, (f) discretion accorded, and (g) amount of overtime required.

This method provides a checklist which may help you do a preliminary analysis of your own job situation compared to a similar job which is paying a higher wage to determine whether your lower wages are justified by the responsibilities of the job. The job paying the higher wage must be "significantly different," both in the amount of extra work involved (or time spent in a particular task) and also in demands placed on skill, effort, or responsibility. If two jobs are substantially the same except that one employee is required to perform one additional duty involving a higher skill, this difference does not remove the jobs from the equal pay requirements unless the additional duty involves work that requires more training and can command a higher wage.[29]

The concept of "reasonable accommodation" to your handicap applies in the determination of similarity of jobs for purposes of wages. You may be hired into a certain job category in which "reasonable accommodation" must be made to your handicap by relieving you from some tasks and replacing those with others. As a general rule, your job will remain "substantially similar" to others within that category, and your wages should be equal. However, where as a result of reasonable accommodation to a handicapped person's limitations, the person's duties are significantly different from those performed by others in the same job classification, different compensation may be provided. The employer must show, however, that the difference in compensation is directly related to a significant difference in duties and responsibilities and is not a result of discrimination.

B. POSSIBLE EMPLOYER CONTENTIONS

An employer may seek to justify a difference in wages between the handicapped worker and another on a number of arguments. Below are some of these possible justifications and arguments for you to use to counter them:

"The non-handicapped worker has a college degree."

Possession of a college degree by one worker is not grounds for a pay differential if a degree is not necessary to job performance. While the concept of skill includes specialized education or training, that factor applies to the education necessary to perform the job and does not refer to the education or training a particular worker may possess if not necessary to the job.

It also follows that possession of any particular skill by one worker is not grounds for a difference in rates of pay if the skill is not needed to meet the actual demands of the job.

"The non-handicapped worker performs the job more efficiently."

Efficiency of performance is not quite the same thing as skill. While efficiency of performance may be a legitimate basis for determining how quickly a worker advances from one job category to the next, it is not a basis for differences in wages.[30]

"The difference in wages is justified because all the employees are paid a base salary plus additional wages which are based on merit and productivity."

This situation requires deeper analysis of the method of determining wages. While most businesses base wage payments on the job category of a worker, some employers use this different system.

It must be determined initially that such a system is indeed in effect -- that is, does the business actually evaluate the performance of all employees at regular intervals? Has this system been communicated to all employees? What criteria are these evaluations based on? Are these criteria job-related? In this case, factors such as efficiency, aptitude, and motivation may be properly included within a merit system to determine the employee's value to the employer, and may affect the rate of compensation.

Compensation systems which measure wages by quantity of production may likewise be valid bases for differences in wages. But any system which measures earnings by quantity of production or quality of performance must be as neutral as possible regarding other discriminatory factors, such as handicap. "Reasonable accommodation" must be made to enable a handicapped worker to perform most efficiently.

"I am reducing your wages to reflect the costs of adapting the workplace and the bathrooms, etc., to accommodate your disability."

This is absolutely forbidden by the regulations. It is the employer's obligation to make such accommodations.[31]

"I am reducing your wages to reflect the amounts that you collect from the government each month for your disability."

The law likewise prohibits this practice.[32] In offering employment or promotions to handicapped individuals, the employer may not reduce the amount of compensation offered because of any disability income, pension, or other benefit the applicant or employee receives from another source.

C. CASE STUDY: COMPARING JOB REQUIREMENTS

1. Facts: Dick applied for a position as a loom operator in a plant that weaves cloth. Dick has a congenital back problem that does not permit him to reach, climb, or lift heavy loads. The employer has made a "reasonable accommodation" to the job to enable Dick to fill the duties of a loom operator. The job category normally requires approximately 2/3 of the time to be spent in setting up the machine, determining the amount of cloth to be knitted, operating the machine to obtain the desired quantity, and recording production. The other 1/3 of the work hours are spent in dismantling bolts of cloth, loading carts, and making minor repairs to the loom throughout the process. The employer arranged for these lifting and reaching duties to be performed by another loom operator and that, during these times, Dick would substitute for the other operator. Since Dick is now spending all of his time doing the first group of tasks, and the other operator is spending 2/3 of his time doing lifting and reaching tasks -- is a wage difference justified?

2. Analysis: We believe that it would not be justified in this instance. The concept of "reasonable accommodation" gives some latitude to adjustments such as this without creating "significant differences." Analysis by the Kress method is appropriate. Under this method we see that the skill levels remain the same -- no additional academic or other training is required. Responsibility is the same in both jobs and the nature of the tasks remains fundamentally the same. The only factor which has changed is effort -- i.e., the physical exertion to perform the job. However, it is exactly the physical exertion factor that the concept of "reasonable accommodation" attempts to eliminate as a basis for different treatment of handicapped persons. Therefore, no wage differential is justified in this circumstance.

CHAPTER 10: BENEFITS, PRIVILEGES AND CONDITIONS OF EMPLOYMENT

A. FRINGE BENEFITS

Once hired, the handicapped worker may share in the fringe benefits of employment on a nondiscriminatory basis.[33] Company policies, whether or not administered by the recipient, must be free from differences between the handicapped employee and his or her co-workers. Such fringe benefits include any medical, hospital, disability, accident or life insurance plans.

It has long been erroneously argued that the actuarial data of insurance companies demonstrated that disabled employees present a greater risk of accident, lower life expectancy, etc. If this were true, to assure coverage and benefits for the disabled employee equivalent to that of non-handicapped employees would require the employer to pay higher premiums. Employers have long objected that they shouldn't have to pay more to assure equal benefits to the handicapped employee.

The regulations clearly state that currently available data and the experience of current employers of disabled people demonstrate no significant difference in risk.[34] For this reason, the regulations indicate that benefits from company programs must be equal, even if higher contributions must actually be paid because of an insurance company's policies.

Additional company benefits to which the nondiscrimination requirements apply may include retirement benefits, service benefits, any profit-sharing or bonus plans, leaves of absences or any similar employment benefits or services. Finally, all other terms and conditions of employment must not discriminate on the basis of handicap or be discriminatorily enforced.[35]

B. RIGHTS AND PRIVILEGES OF EMPLOYMENT

Some of the typical privileges of employment to which the nondiscrimination provisions apply are rest and break periods, and holidays and vacations. Conducted on or off company time and premises, all social and recreational activities must be carried on in an accessible place and in such a manner that the handicapped worker may participate to the fullest extent possible.[36]

Therefore, all of the following must be accessible to the handicapped employee if offered to others: eating facilities, lockers and rest rooms, drinking fountains, housing accommodations, parking lots, and transportation facilities.

Further, the employer has an obligation to maintain a working atmosphere free from bias or harassment by taking "reasonable" measures to control or to elimate the overt expression of employees' prejudices. However, the employer's duty does not extend to completely eliminating his employees' personal prejudices. To hold the employer responsible for the acts of his employees or supervisors, it will be required that the discriminatory conduct must have occurred while the employee was acting in the course of his duties. Further, it will need to be shown that the employer should have known that discriminatory conduct was occurring, and that the employer did not take reasonable steps to stop the conduct.[37] A supervisor's actions, however, may be directly attributable to the employer on the theory that the supervisor is the agent of the employer.

Such harassment may take the form of verbal abuse of co-workers, failure by a supervisor to adequately or equally train the handicapped worker, or the assignment of this worker to only menial job tasks. Other examples of harassment would appear to include excessively harsh discipline or being fired for poor job performance due to vague or inconsistent work instructions.

CHAPTER 11: PROMOTION

Employees must make themselves aware of how their company or agency advances personnel into higher-level positions. An understanding of the criteria involved in promotion will help you recognize where subtle acts of discrimination can occur, or may have occurred if you have not been promoted or have been denied a promotion.

A. OVERVIEW

Criteria on which employers often base promotion:

1. Comparative educational backgrounds of applicants. If you suspect discrimination, you should question: Were only certain minimum educational qualifications necessary for the job? Did you, in fact, meet all the announced or posted educational criteria? Had you pursued opportunities for further educational or technical training?

2. Written ratings of supervisors. The company or agency may have annual performance ratings on which employees are rated on technical skills, creativity, and motivation.[38] If these are used, they must include an objective basis for a rating: for example, rather than a rating stating, "Elsa's attitude is bad," the rating must give a reason such as "Elsa's attitude seems to be poor because she misses work regularly and returns late from lunch often."

3. Testing procedures. Sections 503 and 504 require that whenever an employer includes mental or physical job qualifications as a basis for promotion, such requirements must be job-related or necessary to safe job performance. All tests concerning employment must be selected and administered to accurately reflect the applicant's job skills, aptitude or whatever other factor the test purports to measure. This is to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual or speaking skills, the test results do not reflect merely the impairment.

In addition, under this concept, such tests must be administered in a form usable by the applicant, i.e., in braille, sign language, etc., to accommodate the disability.[39]

Further, the employer may undertake a comprehensive physical examination prior to promotion as long as the results of that test are not used in a discriminatory manner, and are treated confidentially.[40] All entering employees must be subjected to such an examination as a condition of employment.

4. Training. Training as it relates to promotion may include on-the-job training, covered previously in Chapter 9.

Often, however, it involves academic training, possibly to complete a degree, or to do graduate work in your field. Check into programs offered by your employer through your supervisor or personnel office. If the academic training programs involve either payment of tuition by the corporation or agency, time off to attend classes, or perhaps both, and if your employer has such a program for its employees, it must be open to you on equal terms.

5. Seniority systems, lines of progression, career ladders. In nearly all businesses of a significant size whose employees are union-organized, competitive status seniority is used to determine priorities among employment advantages. Seniority systems are also used to determine the order of lay-off or termination in the event of cut-backs in production or personnel and to set the order of return to work. Seniority plays some role in determining the allocation or work projects and, in general, provides employees with a basis for predicting their future employment position.

Seniority may be determined on a number of bases: 1) total length of time with a particular employer, i.e., "employment seniority," 2) length of employment in a department, "departmental seniority," 3) length of time in a "line of progression" or a "career ladder" through which promotion eligibility is determined, or, 4) the length of time at a particular job wihin a business, "job seniority." Each of these measures of seniority is used for a different purpose, and your promotion or layoff "rights" may be determined on the basis of different measures.[41]

Under Sections 503 and 504, an employer may not discriminate against a handicapped person advancing through the seniority system either by placing all handicapped personnel on a separate seniority list or line of progression for jobs which are the same or similar to non-handicapped persons.[42]

B. SPECIFIC PROBLEMS IN PROMOTION

Certain employer practices are common which result in a handicapped employee being discriminatorily denied advancement. We will examine some of these in this section:

1. Qualifications: An employer may feel the disabled employee could not do the work in the higher position. Such belief may be founded on prejudice, or it may be legitimately based on necessary qualifications for a particular job. To make this determination, it is necessary to examine: 1) what the duties and work tasks of the job are; 2) whether the particular disability does, in fact, limit the person's potential performance in that job; and, 3) whether "reasonable accommodation" could be made. Such accommodation may take the form of re-structuring of the tasks of the job, re-engineering of the job or promotion in which any necessary assistive devices would be obtained, or rearrangement of office space or the workplace so that the handicapped person could perform the tasks. You should take the initiative, if necessary, to suggest alternatives to your employer.

If, after making attempts at "reasonable accommodation," the job could not be done without inconveniencing the employee or placing "undue hardship" on the employer's business, we believe it would be proper for the employer to place the disabled employee in the next available position satisfactory to the employee. With such an alternative offer, the employee must consider any possible present, and future differences in pay, job responsibilities, and opportunities for advancement.

2. Customer Preference: An employer may believe that his clients and customers will not want to do business with someone who is handicapped. It is clear

that a job qualification which excludes handicapped persons from a particular job may not be based on the preferences of co-workers or employees. The contention that "customers will stop buying if I have a handicapped person in the job" reflects a real, even if unfounded, fear by employers. However, the preferences of clients and customers are, in ordinary circumstances, no basis for refusing to hire or promote the handicapped person, if otherwise qualified.[43] If they were allowed for consideration, the very prejudices that affirmative action is attempting to overcome would perpetuate discrimination on the basis of handicap. Even if customers did have such prejudices, the placement of a qualified handicapped person into a job with client contact would not place "undue hardship" on the employer.

"Customer preference" can be considered a legitimate job-related qualification only where the company can show that by hiring or promoting this person the company would be unable to perform the primary function or service that it offers. For example, a male applicant for the "Rockettes" chorus line may properly be rejected because of the "preferences" of customers. In this case, the primary function of the job is to convey a certain sexual message through dance; a male could dance as well, but would destroy the "product." If however, the primary function of a company is to manufacture and distribute a quality service or product in an efficient manner, then the physical or mental characteristics of its representatives are not a primary concern as long as the quality of the service or product remains unchanged.[44]

3. Disclosure of Handicap: An employer or supervisor may list the handicap on a personnel file that is sent to other supervisors. Section 503 says that supervisors and managers may be informed of handicapping conditions regarding restrictions on the work or duties of handicapped individuals and regarding accommodations.[45] Section 504 prohibits pre-employment inquiry of an applicant unless the results are used in a non-discriminatory manner and the inquiry is strictly limited to determining whether the person has the ability to do the job.

Similarly, employers may inquire about an applicant's ability to perform a job safely. Thus, an employer may not ask if the person is an epileptic but may ask whether the person can perform a job without endangering other employees.[46] While notation and mention of a handicap may be proper, the regulations require that such mention not be used to discriminate. Therefore, we believe that a supervisor is obligated to also note or mention that the disability has not hindered the effective performance of the present job, has not added significantly to his or her administrative burden, and that accommodation has been made in present job tasks with simple re-engineering or re-structuring. Without such affirmative action on the part of the supervisor, mention of a handicap can be used to discriminate against the disabled employee.

C. CASE STUDY: DISCRIMINATION IN PROMOTION PRACTICES

1. Facts: Greg is 27, and a college graduate in Business Administration. Greg has been legally blind since high school. He was employed by Wonder Cosmetic Corp. in 1971 at an entry-level position doing accounting work in the Customer Services Division. After two years of employment at Wonder Corp., Greg became eligible for promotion. The performance of his duties had been very satisfactory as noted on his record by his supervisor, who

also commented on his good attitude and relationship with fellow employees.

A position became available for which Greg was eligible; that of an "Assistant Services Coordinator." The position duties were to train staff to meet clients and the public who came to the plant site, to discuss the manufacturing process, address any criticisms they might have, and channel these to persons in charge of the Division.

After Greg applied for the job, his supervisor called him over and said, "Listen, Greg, it's not that I have anything against handicapped people, but the customers don't want to do business with someone who is blind. It would be bad for business." On that basis, Greg's application was rejected as "unqualified."

Two months later, Greg was transferred to the Accounts Division within the company, with no promotion. Greg regularly sought re-assignment and advancement from this "dead-end" position. His work, despite his unhappiness at his placement, continued to be of high quality. Greg also returned to college and completed a Master's degree in cost accounting over a period of two years.

When Greg became eligible for promotion, he applied for job vacancies involving a promotion in that division and in others. He was found qualified for the positions, but was not hired for any over the next three years. The personnel file that accompanied his applications noted his visual handicap. When his supervisor was called by the departmental supervisors regarding his applications, his handicap was always mentioned. In the summer of 1975, Greg heard about "affirmative action" for persons with handicaps, and decided to file a complaint.

2. Analysis: To determine whether Greg was denied promotion in a discriminatory way, we will examine the employer's possible contentions for not promoting Greg for three years. If the contentions below are used as a basis for not promoting you, you should question the decision by raising the following considerations:

"I only promoted 1/3 of all the employees who have worked the same length of time as the handicapped employee."

The proper focus is on what basis the employer promoted 1/3 of the individuals and whether Greg was improperly excluded from promotion even though he was as well qualified as the promoted individuals.

"My customers don't want to work with someone who can't see."

As previously discussed, only where the quality or nature of the service would be changed are the preferences of customers a legitimate basis for not promoting a handicapped worker into a position.

Greg's previous work involved a great deal of contact with customers and clients. His relations with co-workers and supervisors had been reported to be excellent, as was the quality of the work he had done. Therefore, since the quality of service to customers would have remained unchanged, it was discriminatory for Greg to be refused a promotion on that basis.

"Greg could not handle the extra reading involved at the higher position."

Employer speculation, without factual basis? Could "reasonable accommodation" be made at the higher level for his handicap; for instance, removing obstacles from his work place or office, special lighting, hiring a reader to perform some of those duties for him? These are recognized obligations under the concept of "reasonable accommodation."[47]

Even if the employer was correct, after the denial Greg was transferred into a "dead-end" job in another division and he received no assistance in finding a new position into which he could be promoted, or any other career counseling. Section 503 requires federal contractors to arrange for career counseling for known handicapped employees.[48] Section 504 is more ambiguous as to the extent of federal grant recipients' obligations but may be interpreted to present similar requirements to eliminate the effects of discrimination from its business.[49] In Greg's case, however, a clearer obligation to counsel or to promote him with transfer would be the responsibility of the employer because Greg was qualified for the Services Coordinator job, except for his handicap. Therefore, it seems that the employer owed him assistance in finding another opportunity equal in pay and responsibility to the position for which he was rejected "solely by reason of his handicap."

"Greg would be too much of an administrative burden on the supervisors."

Does his personnel record indicate that he has been a burden in the past? Has the employer made "reasonable accommodation"? Even if accommodation to Greg's handicap imposed some extra burden on his supervisors, Greg's employer must show that the result creates a disruption and "undue hardship" on his business.

"Greg was not the best qualified."

If Greg met the minimum education and experience requirements of the job, were the extra qualifications of another employee sufficient basis for not advancing Greg?

We believe that Greg should be offered the job if he is qualified to do the work. The "extra" qualifications of another applicant beyond the duties of the job are often the result of opportunities which were denied handicapped persons because of their handicaps. Therefore, those "extra" qualifications must be job-related and relevant to the best performance of this particular job in order to deny the position to Greg.

CHAPTER 12: TRANSFER PRACTICES

A. OVERVIEW

A transfer from one position in a company to another may be requested by either the employer or the employee for a variety of reasons. In companies in which lines of progression (see glossary) are established, the employee may transfer to a higher-paying or better opportunity line of jobs. An employer may, because of production or scheduling conflicts, transfer or temporarily reassign an employee. For "just cause" an employee may be demoted through a transfer. An employee who, due to physical, mental, or emotional disability or medical restrictions, is no longer able to perform his or her regular job may be transferred to another job the employee can perform.

Sections 503 and 504 require that these transfer practices be carried out in a non-discriminatory manner. As seen in prior chapters, however, discrimination may be very subtle. The concept of "reasonable accommodation" is a foremost principle throughout this discussion of transfer practices.

B. BIDDING SYSTEMS

When a vacancy occurs in a job classification other than an entry-level job, the employees throughout the department or even the entire company may be permitted to "bid" on the position. The determination of who gets the job may be based strictly on merit or it may be based on seniority provided that the senior employee can do the job.

As noted in a prior chapter, seniority may be based on the length of service within a company, within a department, or within a certain line of jobs. The use of seniority for transfers is justified by the fact that the advanced jobs in a line of progression require the greater "skill and efficiency" of those who have progressed through the lower series of jobs. Thus, an employee who wishes to transfer into a more desirable line of jobs will often be required to start near the bottom of the other line of progression. This generally is consistent with both the employer's business interests and the employee's expectations.

However, as discussed in Chapter 8, a handicapped employee may initially have been misplaced in a low-opportunity line of jobs which does not reflect the employee's actual skills or potential. At a later time, the handicapped employee may wish to transfer to a more desirable line of jobs for which he or she may already possess many of the necessary skills. The person may find that he or she must, in order to transfer, start at the entry-level position for the new line of jobs.

In this situation, if it is established that the initial placement into a low-opportunity line of jobs was discriminatory, then the system of granting transfers or promotions solely on the basis of job and departmental seniority will continue the effects of that past act of discrimination. The ultimate result is that the handicapped employee will have less job seniority in the new position than non-handicapped employees who have shorter lengths of service in the company but who were placed from the start in the more desirable line of jobs.[50]

Such a bidding system, though neutral in appearance, is in effect a barrier which may delay or bar your advancement.

C. NOTICE REQUIREMENTS

When a job vacancy occurs in a job classification other than an entry-level position, a number of procedures are followed to fill the position. The employer may limit the employees who are able to bid on the position to a certain department or district, or may open it up to all employees within the plant or company. The employer sometimes informs a supervisor or asks supervisors to make recommendations to the employer to find a pool of "select" employees from which to fill the position.

We believe that the fairest method of filling a position is by posting a notice of the vacancy and opening up the position to all employees who qualify.[51] In this way, a supervisor's judgment and possible prejudices do not enter into the selection process. Further, the Section 503 or 504 employer has agreed to take "positive steps" to advance handicapped persons in employment. Thus, the disabled person should particularly be made aware of and encouraged to bid on these transfer opportunities.[52]

D. RATE RETENTION

"Red-circling" of wages or rate retention, describes the practice of paying a higher than normal wage rate for certain specific purposes.

Such wage rates may justifiably be paid where a transfer is to be made in order to "accommodate" or in order to advance a handicapped employee and the new job has a lower initial salary.

For example, assume you were transferred into a line of jobs from which you were previously excluded because of past policy. You should not be forced to suffer a loss of wages because of this. Thus, if your wages were higher in your old job than those in the new one, "red-circling" your wages would mean that you would retain the higher wage level in your new position.[53]

Employers may temporarily reassign an employee to a job other than his or her regular classification. If the employee's regular job pays a higher rate than the temporary job, then payment of the higher rate may be continued during reassignment.[54]

Another situation in which red-circling wages has been used is where a long-term or valued employee becomes ill or disabled and can no longer perform his or her regular job. The employer, in that event, may transfer the employee to different work yet maintain the employee's higher wages.

E. TRANFERS FOLLOWING DISABLING INJURY OR ILLNESS

An employee who is temporarily or permanently disabled as a result of injury or illness may request and reasonably expect to be transferred from the job previously performed into a job which places fewer or different physical or mental demands on the employee. This obligation on the employer stems from the concept of "reasonable accommodation."

An employer may not refuse to reinstate an employee seeking to return from illness or injury on the contention that he or she will be unable to function in their job. Likewise, a flat prohibition against rehiring or reinstating employees with partial work restrictions is improper. Again, the employer has an obligation to attempt to make "reasonable accommodation" for the employee's physical disability or disabling illness. Only if attempts at reasonable accommodation fail and the employee remains physically or mentally unable to perform any job, may the employee be discharged. The burden is on the employer to show the lawfulness of the discharge by establishing that alternative positions were sought or job modifications were attempted.[55]

An employer may earmark certain jobs as "light work," i.e., jobs which do not entail physically exerting tasks.[56] These, however, may not be used to segregate handicapped employees into low-pay, low-opportunity positions.

F. "REASONABLE ACCOMMODATION" AND TRANSFERS

The "reasonable accommodation" obligation generally entails only originality, ingenuity and minimum costs to resolve the disabled employee's physical difficulties on the job. In most job situations, these can be remedied either by restructuring the job tasks, making modifications to the work area, or by making available special assistive devices.

Some situations, however, can't easily be resolved. Even after such attempts are made, the disabled employee may find the job tasks too difficult. At this point, transfer into a different job should be considered as an alternative.

A transfer for the purpose of "reasonable accommodation" would, under normal circumstances, be made into an open, unfilled position. If, however, no positions are currently open, a number of alternatives exist. The employer may seek arrangements with other employees on a voluntary basis, for example, temporarily trading jobs until a vacancy occurs in another job which the disabled employee is physically or mentally able to perform. If the other employee prefers the work assignments in the new job, the trade might be made permanent. If one of the jobs commanded a higher wage, it would be expected that the higher rate would be "red-circled" so that neither employee would lose any wages.

Suggesting voluntary arrangements is the first approach to "reasonable accommodation" through transfer since no nondisabled employee will be burdened in order to benefit the handicapped employee. The fact that no voluntary arrangements are possible, however, would not reduce the employer's obligation to make "reasonable accommodation." We contend that the employer must do more, as discussed in the case study which follows.

G. CASE STUDY: TRANSFER PRACTICES

1. Facts: Lane is a 43 year old male who has cerebral palsy which impairs his physical coordination. His mental capabilities are unaffected.[57]

In high school, Lane developed an interest in electronics. He pursued this interest through a trade school, and following his employment, through night courses. From 1959 to 1974, Lane worked as an experimental electronics technician at Aerodrome Aircraft Company. During this period, he was promoted to a Grade 9 position. His promotions were based on skill, performance, and merit. Lane's competence and basic knowledge of electronics were acknowledged by his co-workers and supervisors.

The employees who work within the Grade 9 job classification -- "experimental electronics technicians" -- perform a variety of tasks depending on the specific project assigned to the technician and on individual work assignments within each project. The principal tasks consist of performing functional tests of electronics systems and components, and analyzing malfunctions. Occasionally, technicians are called upon to construct experimental circuits, requiring soldering and wiring assembly.

Due to Lane's physical disability, he worked slower at many of his tasks and could not easily perform some of the job tasks relating to circuit assembly, particularly the soldering and wire wrapping. While Lane's efficiency rating was the lowest of all employees in that job classification, there was never any indication during his years of employment that Lane was performing unsatisfactorily.

In late 1973, there was a slowdown in work throughout the company, including the workload of the electronics technicians. A number of technicians in Lane's department were laid-off, pending recall when production picked up. In February, Lane's supervisor downgraded and transferred him into another department which did little electronics testing, but did primarily assembly and repair of test equipment. The key skill required of workers in this department was ability at precise assembly and soldering.

As may be guessed, Lane's disability prevented him from successfully and efficiently performing many of his assignments in this department. During his period in that department, his supervisor wrote two letters criticizing Lane's work. The letters were placed in Lane's personnel file.

When the company's personnel office became aware of Lane's difficulties, an unsuccessful search was conducted for open, unfilled electronics jobs in which to place Lane. During the two month search, Lane's file containing the critical reviews of his work was shown to all potential supervisors. In addition, Lane was sent to one supervisor for testing and was asked to perform precision work without his special equipment used for such work. All supervisors rejected Lane. Later that year, Lane was transferred out of the assembly work. Under threat of being fired, he was told to accept a position as a storeskeeper -- a job requiring no electronics skills or knowledge. Lane took the demotion to the lower-grade job.

2. Analysis: This case presents a complex weave of transfer and demotion practices. We will unravel the case to determine where Lane may have been discriminated against on the basis of his handicap. Following each point will be a discussion of alternative employer approaches that you may wish to suggest to your employer if you ever face a similiar situation.

a) Lane's initial transfer from an electronics technician job to the assembly and repair department, which used none of Lane's skills and knowledge, and where his disability hindered his work was discrimination based on handicap. Sections 503 and 504 require "reasonable accommodation" as an integral part of non-discrimination.

Lane was able to acceptably perform the essential duties of an electronics technician. There was never a critical review of his work in this job category. The downgrading and transfer allegedly were based solely on the need to reduce the work force in that department. In fact, the company would argue that the transfer of the handicapped employee was made to avoid the lay-off facing many of the other employees in that area.

We would contend, however, that Lane's transfer from a job he could substantially perform to one in which his disability effectively barred successful performance did not meet the company's obligation to make "reasonable accommodation."

Lane's transfer was not the only reasonably available alternative to layoff. First, the company could have transferred a non-disabled technician out of the department in order to retain Lane in a job which he could perform. Such a transfer might be agreed to voluntarily by the other employee. Retention of full wages by this employee might be assured by the employer.

Second, even if further reductions in the work force would have caused Lane's eventual transfer, it might be established that substantially similar jobs in separate departments or job classifications went unfilled or were filled by other persons. The company could have tranferred Lane laterally to a similar position in a separate department or classification where his disability would not prevent him from doing an acceptable job. The employee in that position, assuming that the employee had no physical disability such as Lane's, could have been laterally transferred into an open position that Lane could not perform because of his disability.

b) In some companies which utilize seniority, if there were no open positions within Lane's job classification, the company could declare a "surplus" within that category. A surplus means simply that there are too many employees in a classification for the number of jobs. With certain limitations, a "surplus" causes the downgrade or layoff of employees in inverse order of their seniority. Had a reduction in force been necessary, it is possible that his relatively high seniority would insure him his position unless there was a drastic reduction in experimental electronics technicians.

c) The physical requirements of the work, following Lane's transfer, were such that he could not reasonably have been expected to perform well. This inability should, and in fact, probably was known to the company's supervisors at the time of his transfer.

d) The supervisor's letters which critized Lane's performance (and were placed in his permanent work record) did not reflect Lane's true abilities. These letters, based only on Lane's work in the assembly and repair department, led supervisors in other departments to reject all attempts to place Lane in work similar to experimental electronics.

e) During this same search for a different job, Lane was sent to another supervisor to be tested on his electronics technician skills through a verbal interview and a manual test. Because Lane did not have his special equipment to perform his precision work, his performance did not reflect his abilities. The supervisor's report to Lane's supervisor and the personnel department further diminished his chances of placement in an electronics job.

Lane is entitled to back pay in the amount equal to the difference in compensation between the technician capacity and the storeskeeper from the time of the demotion. Lane should be placed, within a reasonable time, in an electronics technician job he can perform. Finally, the critical letters placed in Lane's personnel file must be permanently removed.

CHAPTER 13: LAYOFFS AND RIGHT OF RECALL

A. OVERVIEW

A major concern of the newly-hired employee is retaining his or her position with the company. The ups and downs of the company's sales or other market conditions may create a need for the employer to decrease production and, hence, reduce the work force. The company will, of course, want to retain the most capable and most efficient employees during the period of reduced activity in order to minimize costs and assure continued quality of the product. These conflicting concerns of management and the employee have led to formal and informal rules for the layoff and recall of workers. You must familiarize yourself with the rules in your company in order to ensure that the layoff procedure is communicated to all employees, is based on objective criteria, and is followed according to the established procedure.

B. NON-UNION EMPLOYEES

Employers whose work force is non-union are generally free to retain or to recall from layoff the workers whom they believe to have the best qualifications. A non-union employer might initiate a "job performance evaluation system" to determine the order of layoffs or may base layoff and recall on length of service.

If formal or informal job performance evaluation systems are used, the evaluations must be based strictly on objective work factors. These factors will measure the capability of each employee to handle both his or her present job and those jobs that are created by the layoff of other employees. Such criteria may legitimately include the quality of performance of job tasks, conduct, regularity of service, and length of service.

C. UNION EMPLOYEES

Seniority in layoffs, as in promotions, is the most widely used guide to determine the workers' rights. In a unionized company, when a certain task becomes unnecessary because of a phasing down of operations, the employee holding that job can use seniority to "bump" another employee with less seniority out of his or her job to avoid being laid off. In addition, seniority works to the employee's advantage on recall to work. Seniority gives the employee with greater seniority the right to be recalled to work sooner than the co-worker with less seniority.

The result of giving workers the right to "bump" another employee out of a job is that the last employee hired will be the first fired. If the company has refused to hire handicapped workers in the past and has only recently begun to employ these workers, use of seniority will result in bumping many or most of the handicapped workers very quickly and will force them to be the last recalled from layoff.

Courts which have examined the question as it relates to other minorities have recognized that the need to protect minority workers may clash with other employees' expectations from the seniority system. They often cite the practical and political difficulties involved in ordering employers and unions to come up with workable alternatives to using seniority.[58]

With respect to the handicapped worker, many of the same considerations will apply. However, in most cases the relief requested will be limited to one or a few handicapped individuals and, thus, would not result in major disruption of a seniority system. The Supreme Court has held in the area of race discrimination that anyone who can establish discrimination after such practices were outlawed may be awarded retroactive seniority even if the seniority agreement makes no provision for such relief.[59] Further, the language of Sections 503 and 504 indicates that the union agreements are not a defense to allow the employer to eliminate all handicapped employees. Section 504 specifically states that "a recipient of federal grants must comply with the nondiscrimination requirements regardless of the terms of any collective bargaining agreement to which it is a party."[60]

Section 503 states that the affirmative action obligation of federal contractors applies to all employment practices including layoffs and terminations. Additionally, Section 503 states that whenever the affirmative action requirements necessitate revision of a collective bargaining agreement, the labor union or unions which are parties to such an agreement shall be given an opportunity to present their views, and every effort should be made to gain the cooperation of the unionized workers.[61] Thus, while Section 503 does not go as far as Section 504 in limiting the force of the collective bargaining agreement in deciding whether the company's seniority system should be modified, it does implicitly authorize such a change of the agreement.

Finally, if you are a member of a union, that union must attempt to protect you from the discriminatory acts of an employer. That union must assert the rights of its minority members when they bargain with the employer.[62]

D. LAYOFFS AND "SUPER-SENIORITY"

Adherence to a structured line of progression or a seniority system can prevent employees from moving out of a low paying line of jobs to which they were originally and perhaps discriminatorily assigned. A person who wants to transfer may be required to forfeit upon transfer any seniority they have accumulated and start on the bottom rung of the seniority ladder of a new department or line of progression.[63] As a result of this forfeiture of seniority, the handicapped employee will be more vulnerable to layoffs resulting from changes in the employer's method of production or economic circumstances.

Thus, the seniority system will award the choicest jobs and benefits to and protect from the loss of a job those who possess the highest seniority. Due to past discrimination, you, or another disabled employee, were prevented from acquiring this seniority.

Could you be awarded extra seniority to make up for the time you would have spent on the job to which you transferred, had no discrimination occurred? Based on law from cases in the area of racial discrimination, such an award of extra seniority (also called "super-seniority" or "constructive-seniority") is proper to remedy the effects of discrimination which has occurred since such actions or practices became illegal.[64] In the case of the handicapped, that date would be measured from the effective date of the Vocational Rehabilitation Amendments of 1973 or the date of the discriminatory act, whichever occurred latest in time.

2. Must the handicapped worker establish a specific act of discrimination with respect to hiring, transfer, or promotion? Is it sufficient to show that the employer had a policy of not hiring handicapped persons until a certain time and that this hindered the worker from applying for a job, transfer, or promotion at an earlier date? We believe that a handicapped person who can reasonably establish that he or she would have applied for a certain position except for the company's known post-Act discriminatory practices is entitled to retroactive seniority and back pay. This is proper in recognition that a consistently enforced policy of discrimination obviously deters job applicants who, aware of the policy, are unwilling to subject themselves to certain rejection.[65]

What about the non-handicapped workers who have built expectations based on seniority? Placing a handicapped person in a postion by virtue of constructive seniority means that someone else must be "bumped." It also may mean that the other workers will feel hostility to the handicapped worker, thus negating the policy of the Amendments to create positive attitudes in both employers and fellow workers.

This presents a tremendously complex problem with no answer that truly harmonizes the interests on both sides. Where specific discrimination has occurred, "retroactive seniority" with back pay is the only relief which will come close to paying back the monetary and spiritual damages done to the handicapped individual by the discrimination. In order to protect a worker who is bumped to make room for the handicapped worker, some courts have suggested that the employer be required to retain both employees. An alternative suggestion has been to award to the "bumped" non-handicapped employee or to the handicapped employee the wages he would have earned before he was "bumped" by cutbacks in production. This is termed an award of "front pay." In any event, the award of constructive seniority to the handicapped employee is proper where individual discriminatory acts or a discriminatory hiring policy is established. It should not be denied because of the impact on fellow employees.

E. CASE STUDY: LAYOFFS

1. Facts: The Pflange Corporation for many years had a policy of not hiring handicapped employees. Joe, who lost a leg in the Vietnam War, knew of the company's policy and decided not to waste his time by applying. The company, because of its government contract work, became subject to the affirmative action requirements under Section 503. Fearing possible consequences on its contract work because of its hiring policy, the company began hiring some handicapped workers. Joe heard about the change in policy, applied, and was hired in the Assembly Department. After nine months, a recession in the industry forced substantial cutbacks in production and personnel.

Pursuant to the terms of the collective bargaining agreement between the union and the company, such cutbacks in personnel were to be made on the basis of length of employment, i.e., seniority. The last person hired is the first to be laid off; on recall, reverse order is followed -- the last person laid off is the first to be recalled. As a result, Joe, as well as all of the other newly-hired handicapped employees are laid off, with slim chances of being rehired.

2. Analysis: The question this fairly common situation gives rise to is

whether it is discriminatory to use length of service to determine who is to be laid off where Joe and other handicapped workers were prevented by the company's hiring policy from acquiring enough years of service to keep them employed during a recession?

The factors that a court would find significant in resolving this question if Joe and/or other handicapped employees filed suit would be:

a. Whether the company continued to discriminate after the effective date of the Act. If the employer's discriminatory act or practice occurred entirely before this date, the Supreme Court has held (in the area of race discrimination) that employees suffering from such discrimination are not entitled to relief.[66] If the discrimination occurred after this then the handicapped employee should presumptively be entitled to the remedy of retroactive relief to overcome the effects of that past discrimination.[67] Further, the handicapped employee may show that pre-Act discrimination is carried on by present company policies,[68] such as use of seniority to determine layoffs in jobs that were previously closed to disabled employees.[69]

b. Whether the employer can establish that modification of seniority rights will cause undue hardship on the company or organization. To the extent that Sections 503 and 504 are interpreted to limit this obligation we contend that the Act must be read to require a substantial demonstration of "undue hardship."[70] An employer who argues that other employees are angered by the modification of collective bargaining agreements must show that such anger does, in fact, exist and that it produces personnel problems which seriously disrupt the business of the company.

The additional costs of using an alternative system must impose a substantial burden on the company. Whether a burden will be considered "substantial" will be determined by the size and nature of the business.[71]

c. Whether the complaining employee/employees had actually been victims of the company's discriminatory hiring policies. Joe had never actually applied for a position and been refused; his sole reason for not applying was knowledge of the hiring policies of the company.

Courts have often been reluctant to drastically alter the employment expectations of other workers based on the use of seniority. They have argued that giving minority employees special seniority without requiring them to have worked for that time would constitute preferential treatment to someone who was never actually a victim of discrimination.[72] Such courts argue further that even if a worker like Joe had been hired at some earlier time, there is no certainty he would have continued to work for this employer up until the time of layoff.

d. Whether the company had a long history of discrimination against handicapped workers that would have discouraged handicapped job-seekers from applying. A court willing to modify existing collective bargaining agreements might argue that it is not necessary for Joe to have actually been refused employment if the company's hiring policy was so well known in the community as to discourage job seekers.[73]

CHAPTER 14: TERMINATION

A. OVERVIEW

Section 503 and 504 of the Vocational Rehabilitation Act state that federal contractors and federal grant recipients may not terminate ("fire") an employee who is considered "handicapped" within the Act's definition of that term, for a discriminatory reason.[74]

Obviously, however, an employer may lawfully discharge any employee for what is termed "good cause." The difficulty the handicapped worker will face is attempting to determine when a so-called "good cause" discharge is a mere mask for illegal discrimination based on handicap. This section will attempt to identify the scope of the employer's rights and duties, and to focus on the questions that should be raised if you face discharge. Note that discharge may be "constructive" as well as actual. For example, if you are repeatedly harassed or subjected to an employer's discriminatory job practices, and you resign for this reason, you may be held to have been "constructively" discharged.[75] You should request notice of the proposed grounds for the termination and an opportunity to refute the employer or supervisor's charges.

The employer must, in order to maintain efficient and productive operations, be able to discharge those employees who are unfit, unwilling, or unable to perform the duties of his or her job in a safe manner. Therefore, the employer may issue work rules which, if violated, will be grounds for discharge. Note, however, that any such rules must be generally known to employees or must be posted, and they may not be discriminatorily enforced so as to either discharge or discipline more severely one particular employee.[76]

B. EMPLOYER CONTENTIONS

The following are common employer contentions for discharging an employee and the considerations that you should bear in mind if such a reason or excuse is stated:

"The employee was: tardy, disrespectful, sleeping on the job, talking too much to others, inattentive to duties, taking overly long lunch hours, etc."

General work rules are a proper basis for discharge of an employee only if such rules are, and have been, uniformly enforced against all employees for similar violations, and harsher penalties are not imposed on the handicapped employee for the same offense. Minor infractions of disciplinary rules generally result in fines and/or suspension as an alternative to termination.[77] More severe disciplinary actions may signal that the work rules violations are a mask for discrimination.

"The employee refuses to work overtime or on weekends."

If availability to work such periods is a condition of employment or a provision of a collective bargaining agreement, this may be a valid basis for discharge of an employee. If such a reason is given, again determine whether the overtime rule has been posted, or is being selectively or more harshly enforced against the handicapped employee.

If the employee's reason for refusal to work at such times relates to his or her disability, we would contend that the employer must not only show uniform enforcement, but must also show that the overtime rule cannot be accommodated to the disabled employee's necessary schedule. Such reasonable accommodation might be made by asking or arranging for other employees to fill those periods.[78]

It may be said that the employer's "reasonable accommodation" obligation extends only to requesting and not actually requiring other employees to work for those periods. This applies only if the employer can show that ordering other employees to put in more overtime or weekend hours would result in prejudicing other employees' rights, resulting in employee dissatisfaction or low morale.[79] Only if effects such as these are actually demonstrated will the employer's attempts at reasonable accommodation be held to work "undue hardship" on his business, thereby limiting his obligation.[80]

"The other workers don't like working with someone who is handicapped."

It is clear that an employer may not take any action against a handicapped employee solely to accommodate the asserted preferences of co-workers.[81]

"The employee is absent or tardy an excessive amount of time."

While no person would dispute the employer's right to an efficient workforce, other considerations must be raised. The quantity of time off tolerated in other employees should first be ascertained. Also, if the employee's reason for absenteeism or tardiness is related to his or her disability, the requirement of "reasonable accommodation" imposes a duty on the employer to permit a reasonable amount of time off, etc., for a handicapped person, even if the work rules are applied strictly to other employees.

"Reasonable accommodation," may be made by making the work hours more flexible, e.g., permitting the lost hours to be made up by staying later in the day. If this is not possible, and significant amounts of time are involved, a small reduction in wages or part-time status might be a third alternative.[82]

Only if the employer can establish that every employee must be on the job precisely on time and for a required number of hours in order to conduct the business, and that less harsh measures such as suspension are ineffective, should the employer be permitted to discharge an employee who is tardy or absent from work by reason of handicap.

"The employee performs the job poorly."

An unsatisfactory work record is a basis for "good cause" discharge. The Act only protects handicapped persons who with reasonable accommodation can perform the essential functions of the job. However, the handicapped employee must consider a number of factors before accepting this reason without challenge.

Initially, what is the level of job performance of the majority of other employees? Does the employee's actual work record reveal low production, or poor quality work? Has the employee ever been disciplined for his or her job performance? To what extent might the physical or mental handicap be a factor thus requiring reasonable accommodation?

A critical aspect of good job performance is supervision and training in order to inform the employee of what is expected by the employer, to train him or her in performance of the job tasks, to monitor this performance and to provide feedback. A good employer will provide this to all employees. However, too many employers and supervisors do not articulate what is expected of the worker or train the employee and monitor performance. All parties suffer for this lack of supervision.

Where the handicapped employee is concerned, however, such feedback and training is more than good business practice. We believe that it is implicit in the concept of the employer taking "positive steps" to recruit and advance handicapped persons.[83]

The handicapped employee has often been denied employment opportunities needed to gain knowledge of skills and a professional approach to his or her work. Thus, employer involvement is critical to successful job performance. If no feedback is given, the employee will simply repeat past errors. Therefore, if poor job performance is offered as the rationale for termination, the handicapped employee may perhaps legitimately contend that the training and supervision provided failed to meet the obligation implied under the regulations.

"The employee is physically unable to perform the job."

While the Section 503 and 504 regulations only protect qualified handicapped employees from employer actions, even a highly qualified person may fail if physical barriers are not minimized. Thus, in order for an employer to conclude that the handicapped person is physically disqualified, the physical demands of a job must be related to the actual job to be performed. They must be related to the essential duties and not to certain tasks which are incidental to the job.[84] The employer must have attempted to make "reasonable accommodation" to the employee's disability by assistive devices, modification of the work place, or restructuring of the job tasks. Finally, implicit in the concept of accommodation is the idea that the employee must have been afforded a reasonable opportunity to try to do the work before the employer may discharge for an inability to perform the duties.

"The disabled employee has flunked the required company medical examination, which showed the existence of a disqualifying physical illness or condition."

A mere showing of a proscribed physical condition in a medical examination is no more a valid basis for termination of an employee than it is for refusing to hire the worker. If an individual can function efficiently on a job, the mere fact that he is different from the average employee as to preferred physical qualifications is not a proper basis for termination.[85] The employer must establish the "job-relatedness" of the disqualifying condition or illness (bad back, epilepsy, diabetes, etc.) to the current job tasks. Then the employer must go one step further in order to justify termination by showing that "reasonable accommodation" to the worker's handicap cannot be made through modification or transfer.

Even if "job-relatedness" is shown by the employer, the employee may be able to rebut the employer's contention that the worker is physically incapable of performing the job tasks by showing that he or she has functioned well in prior employment, is currently performing and would be capable of future performance on the job.[86]

If the worker establishes that he or she can presently function efficiently on the job despite a physical limitation that seemingly is related to effective job performance, then the burden should shift to the employer to show that compelling "business necessity" permits termination of the employee. The employer might argue that, despite the worker's present ability to perform, the working conditions of the job would be hazardous to the worker's condition or illness. The employer might also contend that the worker would present a significant safety threat to other employees or himself on a regular basis, such as where an epileptic whose seizures cannot be substantially controlled is performing hazardous work tasks.

"The worker has a degenerative condition or illness (such as cancer, arthritis, degenerative muscular diseases) which will render him or her incapable of future performance."

The Rehabilitation Act protects workers who, whatever their future ability to work may be, are presently qualified to perform the job. Future physical problems should not limit the worker's protection, unless the worker's condition is deteriorating so rapidly that he or she would be incapable of performance for any "reasonable" period of time in a particular job.[87]

Further, to have any validity, the medical report should show to a "reasonable degree of medical certainty" that the worker would be incapable of performance on the job,[88] or that working conditions would be hazardous to the employee's health. Even if such evidence is put forth by the company physicians, a worker's introduction of conflicting medical opinions by his own physician as to the future impact of the degenerative condition should be given equal weight.[89]

If it is ultimately established that future performance will be significantly impaired, but that the worker can currently perform for a reasonable period of time, the concept of "reasonable accommodation" would indicate that the proper action is a transfer at that later time. Termination should be permissible only if no alternative positions exist at that future date.

NOTES

PART I

The following notes may be of more interest to professionals, that is, attorneys and other advocates, than to the layperson. All materials cited may be located at a law school library. Ask the law librarian for assistance in locating and copying materials.

In Part I references to the Sections 503 and 504 regulations are incorporated in abbreviated form, in brackets, in the text.

Section 503 regulations are printed at 41 C.F.R. part 60-741 (1976).

The Department of Health, Education, and Welfare regulations for Section 504 are printed at 42 Fed.Reg. 22676 (1977) (to be codified in 45 C.F.R. part 84).

CHAPTER 1

1. Federal contractors doing $10,000 or more worth of business with the federal government must immediately list all suitable openings with state or federal employment service office in order to give priority to veterans. See 38 U.S.C. 2012(a) (Supp.V 1975). This requirement assures that at least some of the employers covered by Section 503 will list with the employment service. The veteran priority does not preclude other applicants from using the information.

2. Drug addicts and alcoholics are included within the scope of the definition of handicapped used in the Rehabilitation Act. They are considered handicapped to the extent that their addiction or alcoholism substantially limits one of their major life activities. "Analysis of Final Regulation" [Dep't of Health, Educ., and Welfare regulations for Section 504], Comment 4, 42 Fed.Reg. 22686 (1977).

3. 42 U.S.C. 2996f(a)(2)(A) and (B) (Supp.V 1975).

4. President's Committee on Employment of the Handicapped, Handbook on the Legal Rights of Handicapped People, "Introduction" (1976).

5. Job Safety and Health, Vol. 2, No. 9, Sept. 1974, reprinted and distributed by the President's Committee on Employment of the Handicapped, Washington, D.C.

CHAPTER 2

6. See 29 U.S.C. 706(6) (Supp.V 1975); 42 Fed.Reg. 22676 (1977) [to be codified in 45 C.F.R. 84.3(j)]; 41 C.F.R. 60-741, Appendix A (1976).

CHAPTER 3

7. What may constitute an undue hardship has been litigated with regard to religious discrimination in employment prohibited by Title VII of the Civil

Rights Act of 1964, 42 U.S.C. 2000e, et. seq. In Trans World Airlines v. Hardison, 45 U.S.L.Wk. 4672 (June 14, 1977), 97 S.Ct. 2264 (1977), the United States Supreme Court considerably narrowed the employer's obligation under Title VII to make an accommodation to the employee's need to have his Sabbath day free. The Court concluded that Title VII did not require an employer to go so far as to "deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, ..." 45 U.S.L.Wk. at 4678.

One can argue that the Court's construction of undue hardship for purposes of Title VII should not be extended to implementation of Sections 503 and 504. There is little or no legislative history that supports including an undue hardship exemption in the regulations. The "undue hardship" limitation is added by the implementing regulations, as is the "reasonable accommodation" requirement. However, whereas requiring an accommodation furthers the legislative purpose to expand employment opportunities for the handicapped, the undue hardship exemption undermines fulfillment of the purpose.

8. The HEW regulations for Section 504 specifically require that a recipient's programs be accessible when viewed in their entirety. 42 Fed.Reg. 22681 (1977) (to be codified in 45 C.F.R. 84.21-84.23). In addition, physical accessibility of facilities is specified as one type of reasonable accommodation. 42 Fed.Reg. 22680 (1977) [to be codified in 45 C.F.R. 84.12(b)]. Although the Section 503 regulations do not address access, accessibility is clearly necessary to meet the objectives of nondiscrimination and affirmative action. At the least, Section 503 incorporates the concept of access in the requirement of reasonable accommodation. See 41 C.F.R. 60-741.6(d) (1976).

9. It does not seem that a bona fide seniority system would be an obstacle to the type of arrangement noted in the text. Section 504 prohibits any external requirement from limiting compliance with the nondiscrimination requirement. 42 Fed.Reg. 22680 (1977) (to be codified in 45 C.F.R. 84.10). Section 503 implies that its requirements have priority over a contract with workers. See 41 C.F.R. 60-741.4(e) (1976). Compare Trans World Airlines v. Hardison, 45 U.S.L.Wk. 4672 (June 14, 1977), 97 S.Ct. 2264 (1977)(indicating that such an arrangement did violate the bona fide seniority system regardless of the Title VII requirement of reasonable accommodation to avoid religious discrimination). See also note 13, infra.

CHAPTER 4

10. The facts in the case study and the analysis are substantially drawn from Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D.Pa. 1976), aff'd 4 FEP Cases 1359 (3d Cir. 1977). Although the court did not base its decision on Section 504, the situation lends itself to a discussion of that statute.

11. See Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D.Pa. 1976).

CHAPTER 5

12. The Section 503 regulations place the burden on the employer to prove that requirements are job-related and consistent with business necessity and the safe performance of the job. 41 C.F.R. 60-741.6(c)(2). This is unlike the comparable requirement in the HEW regulations which places the burden on the Director of the Office for Civil Rights to show that there are alternative job-related criteria available which do not have such a detrimental impact on as many handicapped persons as the original requirement. 42 Fed.Reg. 22680 (1977) [to be codified in 45 C.F.R. 84.13(a)].

13. Although the Section 503 regulations require that an employer notify any union or other representative of workers with which it has a collective bargaining agreement or other contract understanding that he or she is "bound" by Section 503 and "committed" to take affirmative action, 41 C.F.R. 60-741.4(e) (1976), other language in the regulations suggests that some exceptions may be made. Unions which are parties to affected collective bargaining agreements must be given an adequate opportunity to present their views to the contracting or compliance agency or to the Director of the Office of Federal Contract Compliance Programs. 41 C.F.R. 60-741.9(a) (1976).

CHAPTER 6

14. The Supreme Court has held with regard to proof of discrimination in a sex discrimination case that there are four items the complainant must establish: (1) the complainant was a member of the protected class; (2) that he or she had applied for jobs for which they were qualified as demonstrated by their previous employment and records; (3) that despite their qualifications they were either rejected or failed to be considered; and (4) that after their rejection the positions remained open until the employer hired a non-minority applicant. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). These steps merely illustrate a method of framing a complaint and are not mandatory under Sections 503 and 504.

15. Case summaries received from the Office of Federal Contract Compliance Programs in July, 1977, indicated the variety of corrective actions that can be taken. For example, the complainant was to be offered a future job when one became available, an alternative position was to be offered at the same rate of pay with company benefits and backpay, a former employee was to be reinstated with full seniority, a Social Security contribution was to be paid for the period in question.

16. See note 14, supra.

17. Brown v. Weinberger, 417 F.Supp. 1215 (D.C.D.C. 1976).

18. The experiences of enforcement efforts with prior civil rights legislation indicate that fund termination has not been used as the effective tool it should be. Twelve years after the passage of the Civil Rights Act of 1964, it was said that "the congressional mandate remains unexecuted; discriminatory practices still abound among programs and activities receiving federal funds." Note, Enforcing a Congressional Mandate: LEAA and Civil Rights, 85 Yale L.J. 721, 722 and n.8 citing VI United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort -- 1974, at 1-2 (1975), 722-727 (April 1976). See also Note, Sex Discrimination -- The Enforcement Provisions for Title IX of the Education Amendments of 1972 Can Be Strengthened to Make the Title IX Regulations More Effective, 49 Temple L.Q. 207, 216-220 (Fall 1975); Taylor, Federal Civil Rights Laws: Can They Be Made to Work? 39 Geo.Wash.L. Rev. 971 (1971).

19. It seems likely that, at the least, judicial review of the administrative proceedings is available. Jurisdiction based on a federal question should apply. *See* 28 U.S.C. 1331 (1976).

Case law indicates that a private right of action exists under Section 504 distinct from judicial review of administrative proceedings. *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1286 (7th Cir. 1977). Accord: *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977). *See* Analysis of Final Regulation, Comment 8, 42 Fed.Reg. 22687 (1977).

Both *Lloyd* and *Kampmeier* were decided before the HEW regulations were issued. Now that administrative proceedings are available, the courts are likely to require that they be exhausted before a court will consider the case. *Compare Bradford School Bus Transit Inc. v. Chicago Transit Auth.*, 537 F.2d 943 (7th Cir. 1976) (re: exhaustion of administrative remedies when administrative procedures are available).

To date, case law under Section 503 finds that no private cause of action is available under that section. *See Rogers v. Frito-Lay, Inc.*, 433 F.Supp. 200 (N.D.Tex. 1977).

PART II

All cites may be located at a law school library. Ask the law librarian for assistance in locating and copying materials.

CHAPTER 7

20. 45 C.F.R. § 84.11(a)(b) (1977).

21. 41 C.F.R. § 60-741.6(a)-(h) (1976).

22. 41 C.F.R. § 60-741.6(a) (1976).

23. *See*, 41 C.F.R. § 60-741.6(b); (i)(2) (1976).

CHAPTER 8

24. 45 C.F.R. § 84.11(a)(4) (1977).

25. *See*, *United States v. Carpenter's Local 169*, 457 F.2d 210 (unions and other apprenticeship committee may not limit information on training opportunities by word of mouth recruiting or preferential treatment of friends or relatives), *cert. denied*, 409 U.S. 851 (1972).

26. *See generally*, 41 C.F.R. § 60-741.6(a) (1976); 45 C.F.R. § 84.11(a)(7) (1977).

27. See, 45 C.F.R. § 84.4(iv) (1977).

CHAPTER 9

28. See, 41 C.F.R. § 60-741.6(a) (1976); 45 C.F.R. § 84.11(b)(3) (1977).

29. 1 Employment Discrimination, A. Larsen, "Sex," § 29.20 (1975).

30. Efficiency of performance measures the ability to apply one's skills to a job without excess time or wasted effort, and differs from the skill or ability in job performance. See, e.g., 29 C.F.R. § 800.125 (1971).

31. 45 C.F.R. § 84.12(a) (1977).

32. 41 C.F.R. § 60-741.6(e) (1976).

CHAPTER 10

33. 41 C.F.R. § 60-741.6(a),(e) (1976); 45 C.F.R. § 84.11(b)(6) (1977).

34. 45 C.F.R. Appendix A -Subpart B, no. 19 (1977).

35. 45 C.F.R. § 84.11(b)(6-9) (1977).

36. Ibid.

37. See, e.g., Anderson v. Methodist-Evangelical Hospital, 4 F.E.P. Cases 33 (1971).

CHAPTER 11

38. Additional legitimate factors may include job stability, age, character, attitude and behavior.

39. 41 C.F.R. § 60-741.6(c)(2) (1976); 45 C.F.R. § 84.13(a),(b) (1977). See also, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

40. 41 C.F.R. § 60-741.6(c)(3) (1976); 45 C.F.R. § 84.14 (1977).

41. For purposes of calculating benefits, such as vacations, pensions, and other fringe benefits, an employee's seniority may run from the date he or she joins the company. For competitive purposes, however, such as determining the order in which employees may bid for particular jobs, or are laid off, length of time on a particular job may control.

42. 41 C.F.R. § 60-741.6(i)(2) (1976); 45 C.F.R. § 84.11(b)(4) (1977).

43. 1 Employment Discrimination, A. Larsen, "Sex," § 15.40, Mathew Bender, New York (1975).

44. See, e.g., Diaz v. Pan Am World Airways, 442 F.2d 385,389 (1971), (customer preference for female airline personnel not a bona fide occupational qualification). See also, Mieth v. Dothard, 418 F.Supp. 1179 (N.D.Ala. 1976),

(BFOQ doctrine is narrow exception to general rule of equality of employment opportunities).

45. 41 C.F.R. § 60-741.6(c)(3) (1976).

46. 45 C.F.R. Appendix A - Subpart B, no. 18 (1977).

47. See, 45 C.F.R. § 84.12(b) (1977).

48. 41 C.F.R. § 60-741.6(f) (1976).

49. 45 C.F.R. § 84.11(a)(2-3) (1977).

CHAPTER 12

50. See, e.g., Casey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1972), (where class A jobs and the less desirable class B jobs had been segregated and thereafter employer allowed class B employees to bid on class A job vacancies but determined promotion and layoff seniority only from time class B employee hired into A job, employer found guilty of continuing discrimination).

51. See, e.g., Swint v. Pullman Standard, 539 F.2d 77 (5th Cir. 1976).

52. 41 C.F.R. § 60-741.6(f) (1976); 45 C.F.R. § 84.11(a)(2) (1977).

53. White v. Carolina Paperboard Corp., 13 F.E.P. Cases 1299 (W.D.N.C. 1975).

54. Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976), ("red-circling remedy developed to eliminate financial barriers to discriminatees rising to rightful place").

55. 41 C.F.R. § 60-741.6(d) (1976); 45 C.F.R. Appendix A - Subpart B, no. 16, (1977).

56. See, e.g., Ward v. Firestone, 260 F.Supp. 579 (W.D.Tenn. 1966) (earmarking of job had bona fide relation to occupational qualification).

57. Case study facts and findings based on Holland v. Boeing Co., 12 F.E.P. Cases 975 (1976).

CHAPTER 13

58. Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975) (the burden of retroactive seniority would fall directly upon other workers who have themselves had no hand in the wrongdoing).

59. T.I.M.E.-D.C., Inc. v. United States, ___ U.S. ___, 52 L.Ed. 396 (1977).

60. 45 C.F.R. §84.11(a)(4),(c) (1977).

61. 41 C.F.R. § 60-741.9 (1976).

62. *Steele v. L.&N.R.R.*, 323 U.S. 192, 199 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967).

63. *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975).

64. *T.I.M.E.-D.C., Inc. v. United States*, ___ U.S. ___, 52 L.Ed. 396 (1977).

65. *Ibid.*, (nonapplicant properly awarded retroactive seniority where shown: (1) he or she would have applied but for the discrimination, and (2) that he or she would have been discriminatorily rejected).

66. *Ibid.*, at 423.

67. *Ibid.*, at 422.

68. *Casey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

69. *T.I.M.E.-D.C., Inc. v. United States*, ___ U.S. ___, 52 L.Ed. 396, 422 (1977).

70. We contend that the undue hardship exemption of the implementing regulations seriously undermines the employment protections of the Rehabilitation Act. This exemption is inconsistent with the legislative purpose to expand employment opportunities for the handicapped. It is neither authorized by the statute nor supported by the legislative history. *See generally*, "Vocational Rehabilitation Services to the Handicapped: Hearings on H.R. 8395, H.R. 9847, and Related Bills before the Select Subcomm. on Education of the House Comm. on Education and Labor," 92 Cong., 2d Sess. at 20 (1972); "Rehabilitation Act, 1973: Hearings on S. 7 before the Subcomm. on the Handicapped of the Sen. Comm. on Labor and Public Welfare," 93rd Cong., 1st Sess. at 165-166, 169-170 (1973).

71. 41 C.F.R. § 60-741.9 (1976); 45 C.F.R. § 84.11(c) (1977).

72. *Paperworkers, Local 189 v. United States*, 416 F.2d 980, 995 (5th Cir. 1969), (relief would not necessarily aid the actual victims of discrimination).

73. *T.I.M.E.-D.C., Inc. v. United States*, ___ U.S. ___, 52 L.Ed. 396, 433 (1977).

CHAPTER 14

74. 41 C.F.R. § 60-741.6 (1976); 45 C.F.R. § 84.11(b)(2) (1977).

75. *See, e.g.*, *Muller v. U.S. Steel Corp.*, 7 F.E.P. Cases 861 (D.Utah 1974) ("constructive" discharge found where Spanish-American employee resigned to seek less biased employment).

76. *See, e.g.*, *Nat'l Cash Register Co.*, 51 Lab.Arb. 1165, 1169 (1968) (discharge not warranted for extensive absenteeism where no clear, published rules and worse attendance records tolerated in other employees). Case does not arise under Sections 503 or 504, but illustrates arguments that may be raised under the Act.

78

77. *See, e.g., Foster-Wheeler Corp. and (1971) Machinists Lodge 1665*, 57 Lab.Arb. 1171 (1971) (discharge for "horseplay" unjustified where employee had mental and nervous disability requiring treatment). Not a Sections 503 or 504 case.

78. 41 C.F.R. § 60-741.6(d) (1976); 45 C.F.R. § 84.12(b) (1977).

79. *See*, *Trans World Airlines v. Hardison*, ___ U.S. ___, 14 F.E.P. Cases 1697 (1977).

80. 41 C.F.R. § 60-741.6(d) (1976); 45 C.F.R. § 84.12(b) (1977).

81. *See also*, Footnote 21.

82. 41 C.F.R. § 60-741.6(d) (1976); 45 C.F.R. § 84.12(b) (1977).

83. 41 C.F.R. § 60-741.6(f) (1976); 45 C.F.R. § 84.12 (1977).

84. *See, Bevan v. New York State Teachers Retirement System*, 345 N.Y. Supp.2d 921 (1973), (blind teacher not disqualified from teaching job where could perform teaching duties and administrative tasks could be reassigned).

85. *Chicago, M., St. P.&P.R. Co. v. State, Dept. of I.L.&H.R.*, 215 N.W. 2d 443 (Wisc. 1974).

86. *Ibid.*, at 446.

87. *Cf.*, *Westinghouse Air Brake Co.*, 53 Lab.Arb. 763 (1965), (disabled employee lawfully discharged where he could not be employed without risk of aggravating his condition or causing new injury). Not a Sections 503 or 504 case.

88. *Chicago, M., St. P.&P.R. Co. v. State, Dept. of I.L.&H.R.*, 215 N.W. 2d 443 (Wisc. 1974).

89. *See, e.g.*, *Harnischfeger Corp.*, 60 Lab.Arb. 1248 (1973), (conflicting medical testimony rendered discharge improper). Not a Sections 503 or 504 case.

APPENDIX A: REGIONAL OFFICES OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Note: If you are in one of the states listed for a region, use the regional office in the same region. If you have any problems dealing with or contacting the regional office, call or write the main office in Washington, D.C.:

Director
Office of Federal Contract Compliance Programs
Third and Constitution Avenue, N.W.
Washington, D.C. 20210

(202) 523-9475

REGION I -- Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Regional Director
Office of Federal Contract Compliance Programs, Region I
Department of Labor
John F. Kennedy Federal Building
Boston, MA 02203

REGION II -- New Jersey, New York, Puerto Rico, Virgin Islands

Regional Director
Office of Federal Contract Compliance Programs, Region II
Department of Labor
1515 Broadway
New York, NY 10036

REGION III — Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia

Regional Director
Office of Federal Contract Compliance Programs, Region III
Department of Labor
3535 Market Street
Philadelphia, PA 19104

REGION IV — Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee

Regional Director
Office of Federal Contract Compliance Programs, Region IV
Department of Labor
1371 Peachtree Street
Atlanta, GA 30309

REGION V — Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin

Regional Director
Office of Federal Contract Compliance Programs, Region V
Department of Labor
219 South Dearborn Street
Chicago, IL 60604

REGION VI -- Arkansas, Louisiana, New Mexico, Oklahoma, Texas

Regional Director
Office of Federal Contract Compliance Programs, Region VI
Department of Labor
1100 Commerce Street
Dallas, TX 75202

REGION VII -- Iowa, Kansas, Missouri, Nebraska

Regional Director
Office of Federal Contract Compliance Programs, Region VII
Department of Labor
911 Walnut Street
Kansas City, MO 64106

REGION VIII -- Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming

Regional Director
Office of Federal Contract Compliance Programs, Region VIII
Department of Labor
1961 Stout Street
Denver, CO 80202

REGION IX -- Arizona, California, Hawaii, Nevada, Guam, Trust Territory of Pacific Islands, American Samoa

Regional Director
Office of Federal Contract Compliance Programs, Region IX
Department of Labor
450 Golden Gate Avenue
San Francisco, CA 94102

REGION X — Alaska, Idaho, Oregon, Washington

Regional Director
Office of Federal Contract Compliance Programs, Region X
Department of Labor
502 2nd Avenue
Seattle, WA 98104

APPENDIX B: REGIONAL CIVIL RIGHTS DIRECTORS

Note: If you are in one of the states listed for a region, use the regional office in the same region. If you have any problems dealing with or contacting the regional office, call or write the main office in Washington, D.C.:

Director
Office for Civil Rights
Department of Health, Education, and Welfare
Washington, D.C. 20201

(202) 245-6403

REGION I -- Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Mr. John G. Bynoe
Regional Director
Office for Civil Rights, Region I
Dept. of Health, Education, and Welfare
140 Federal Street
Boston, MA 02110

(617) 223-6397

REGION II -- New Jersey, New York, Puerto Rico, Virgin Islands

Mr. William Valentine
Acting Regional Director
Office for Civil Rights, Region II
Dept. of Health, Education, and Welfare
26 Federal Plaza - Room 3908
New York, NY 10007

(212) 264-4633

REGION III -- Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia

Mr. Dewey E. Dodds
Regional Director
Office for Civil Rights, Region III
Dept. of Health, Education, and Welfare
Gateway Building, 3535 Market Street
Post Office Box 13716
Philadelphia, PA 19101

(215) 596-6772

REGION IV — Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee

Mr. William H. Thomas
Regional Director
Office for Civil Rights, Region IV
Dept. of Health, Education, and Welfare
680 W. Peachtree Street, N.W.
Atlanta, GA 30308

(404) 881-3312

REGION V -- Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin

Mr. Kenneth A. Mines
Regional Director
Office for Civil Rights, Region V
Dept. of Health, Education, and Welfare
300 South Wacker Drive
Chicago, IL 60606

(312) 353-2521

Cleveland Office
Office for Civil Rights
Dept. of Health, Education, and Welfare
Plaza Nine Building
55 Erieview Plaza - Room 222
Cleveland, OH 44114

(216) 522-4970

REGION VI -- Arkansas, Louisiana, New Mexico, Oklahoma, Texas

Ms. Dorothy D. Stuck
Regional Director
Office for Civil Rights, Region VI
Dept. of Health, Education, and Welfare
1200 Main Tower Building
Dallas, TX 75202

(214) 655-3951

REGION VII — Iowa, Kansas, Missouri, Nebraska

Mr. Taylor D. August
Regional Director
Office for Civil Rights, Region VII
Dept. of Health, Education, and Welfare
Twelve Grand Building
1150 Grand Avenue
Kansas City, MO 64106

(816) 374-2474

REGION VIII -- Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming

Dr. Gilbert D. Roman
Regional Director
Office for Civil Rights, Region VIII
Dept. of Health, Education, and Welfare
Federal Building
1961 Stout Street - Room 11037
Denver, CO 80294

(303) 837-2025

REGION IX -- Arizona, California, Hawaii, Nevada, Guam, Trust Territory of Pacific Islands, American Samoa

Mr. Floyd L. Pierce
Regional Director
Office for Civil Rights, Region IX
Dept. of Health, Education, and Welfare
100 Van Ness Avenue - 14th Floor
San Francisco, CA 94102

(415) 556-8586

REGION X -- Alaska, Idaho, Oregon, Washington

Ms. Marlaina Kiner
Regional Director
Office for Civil Rights, Region X
Dept. of Health, Education, and Welfare
1321 Second Avenue - Room 5041 MS/508
Seattle, WA 98101

(206) 442-0473

INDEX

Page

ABSENTEEISM
  as basis for denial of promotion.......... 42
  work rules violation.......... 57

ACADEMIC PROGRAMS
  (See Training, Promotion)

ACCESSIBILITY
  (See Glossary, generally all chapters)

ADAPTATION OF WORKPLACE, JOB OR EQUIPMENT.......... 11-13

ADAPTIVE EQUIPMENT
  (See Reasonable Accommodation)

ADMINISTRATIVE COMPLAINT PROCEDURES
  authorized representative, filing by,.......... 25
  basic procedure.......... 24
  conciliation and persuasion.......... 26-27
  corrective action taken under,.......... 27
  court action.......... 29
  deadlines.......... 25
  failure to comply with employers' obligations.......... 24
  filing of complaint.......... 27-28
  formal procedings.......... 27
  investigation by agency.......... 26
  outline of process.......... 24
  referral to employer, when permissible.......... 25-26
  requirements of,.......... 25
  retaliation.......... 29
  sanctions brought on employer.......... 28-29
  satisfactory resolution through informal means.......... 24
  suspension of complaint procedure.......... 29

ADVANCEMENT
  (See Placement, Promotion)

AFFIRMATIVE ACTION.......... 1
  obligation to take,.......... 1-2
  positive steps.......... 7

APPLICATION PROCESS.......... 14, 20-21
  permissible questions, written qualification examinations.......... 14-15
  eligibility lists.......... 14

APPRENTICESHIP PROGRAMS
  discrimination.......... 34

Page

BARRIERS TO ADVANCEMENT
  (See Reasonable Accommodation, Placement, Transfers)

BENEFITS OF EMPLOYMENT
  (See Benefits, Privileges and Conditions of Employment)

BENEFITS, PRIVILEGES & CONDITIONS OF EMPLOYMENT
  accident insurance 40
  actuarial data 40
  agent of employer 40
  assignment to menial jobs 41
  bias, harassment, by employees, supervisor 40-41
  bonuses 40
  break periods 40
  course of duty, discrimination in 40
  disability insurance 40
  discipline 41
  drinking fountains, access to 40
  eating areas, access to 40
  equal benefits 40
  excessive discipline 41
  fringe benefits 40
  harsh discipline 41
  holidays 40
  hospital insurance 40
  housing accommodations, accessibility of 41
  inadequate training 41
  life insurance 40
  locker rooms, access to 40
  lower life expectancy 40
  medical benefits 40
  parking lots, access to 40
  poor instruction 41
  prejudices of fellow employees 40
  profit-sharing plans 40
  recreational activities, accessibility in 40
  rest periods 40
  rest rooms, access to 40
  retirement benefits 40
  risk of accident or loss 40
  service benefits 40
  social activities, access to 40
  supervisor's actions 40
  vacations 40
  verbal abuse 41

BIAS 40

BONUSES 40

BUSINESS NECESSITY
  (See generally all chapters)

Page

CAREER COUNSELING
(See Placement, Promotion)

COLLECTIVE BARGAINING AGREEMENTS
effect of, ... 54

COMPENSATION
(See Rates of Pay)

COMPLAINT PROCESS 4, 9
(See Chapter 6)

CONCILIATION AND PERSUASION 26-27

CONDITIONS OF EMPLOYMENT 40
(See generally Benefits, Termination)

CONFIDENTIALITY OF INFORMATION 16, 21

CONSTRUCTIVE SENIORITY
(See Layoffs, Termination)

COURT ACTION 29

CUSTOMER PREFERENCE 43-44

DEAD-END JOB
(See Placement)

DEFINITION OF HANDICAP 2
(See Glossary)

DEGENERATIVE CONDITION
as grounds for termination 60

DENIAL OF PROMOTION
(See Promotion)

DEPARTMENTAL SENIORITY 47

DISABILITY INCOME
(See Rates of Pay)

DISABLING ILLNESS OR INJURY 48-49

DISCHARGE
(See Termination)

DISCRIMINATION
(See generally all chapters)

DISCRIMINATORY ENFORCEMENT OF WORK RULES
(See Conditions of Employment, Termination)

Page

EDUCATIONAL QUALIFICATIONS.......... 42

EFFECT OF COLLECTIVE BARGAINING AGREEMENTS.......... 19, 23

EMPLOYERS' OBLIGATION
  under federal law,.......... 14, 20
  to make reasonable accommodation,.......... 10

EMPLOYMENT BENEFITS
  (See Benefits, Privileges and Conditions of Employment)

ENFORCEMENT OF RIGHTS.......... 24

ENTRY-LEVEL POSITIONS.......... 32

EQUAL BENEFITS
  (See Benefits, Chapter 2 - summary)

EQUAL OPPORTUNITY.......... 7
  reasonable accommodations as factor.......... 7, 10

EQUAL PAY REQUIREMENTS
  (See Rates of Pay)

ESSENTIAL REQUIREMENTS.......... 16
  (See Reasonable Accommodation)

EVALUATION OF QUALIFICATIONS
  requirement of job relatedness.......... 17-18, 22-23

FEDERAL AID RECIPIENTS.......... 1
  how to determine,.......... 1-2
  (See Section 504)

FEDERAL CONTRACTORS.......... 1
  (See Section 503)

FEDERAL LAW
  employers' obligation under,.......... 1

FILING A COMPLAINT.......... 24-25, 27

FINAL SELECTION.......... 18, 23

FIRING OF EMPLOYEE
  (See Termination)

FRINGE BENEFITS.......... 40

Page

GETTING HIRED
    action following refusal.. 16-17
    application.. 14, 15-16
    case study... 14
    discrimination in,.. 14
    effect of collective bargaining agreement........................ 19
    essential requirements.. 16-17
    evaluation of qualifications.................................. 17-18
    final selection.. 18
    job-related requirements.. 14, 16-17
    medical requirements.. 17
    recruitment.. 14, 15
    testing requirements.. 17
    written qualification examinations............................ 15, 17

GOVERNMENT CONTRACTOR
    how to determine.. 1

HANDICAP
    definition of,.. 2
    (See Glossary)

HARASSMENT.. 3, 29

INSURANCE.. 40

INTERVIEWS.. 13, 17-18
    permissible questions... 18
    evaluation of qualifications.................................. 22-23

INVESTIGATION BY AGENCY... 24
    resolution of grievance.. 25-27
    suspension of complaint.. 26
    formal proceedings.. 27

JOB PERFORMANCE EVALUATION SYSTEMS
    (See Layoffs)

JOB-RELATED REQUIREMENTS... 14-17, 21, 4

JOB RESTRUCTURING.. 13

JOB RETENTION
    (See Layoffs, Termination)

JOB VACANCIES
    (See Promotion, Transfer)

LATERAL TRANSFERS.. 47-48

Page

- LAYOFFS
  - alternatives to seniority 54
  - back pay awards 55
  - "bumping" fellow employee 53
  - collective bargaining agreements, effect of 54
  - constructive seniority 54-55
  - discrimination in 53-55
  - extra seniority 54-55
  - front pay 55
  - job performance evaluation systems 53
  - job retention 53
  - non-union employers 53
  - order of layoff 53
  - personnel cutbacks 53
  - preferential treatment 56
  - production cutbacks 53
  - recall from, ... 53
  - right of recall 53
  - retroactive seniority 54-55
  - seniority systems 53-54
  - "super" seniority 54
  - undue hardship 56
  - union employer 53-54
  - victim of discrimination 56

- LEGAL AID ASSISTANCE
  - how to obtain 3

- "LIGHTWORK" 49

- LINE OF PROGRESSION 47
  - (See Glossary)

- MEDIATION OF COMPLAINT 26-27

- MEDICAL EXAMINATION
  - as grounds for termination 59
  - confidentiality of 44
  - future performance 60

- MEDICAL REQUIREMENTS
  - under Section 503 22
  - under Section 504 17

- MENTAL HANDICAP
  - (See generally all chapters)
  - testing of 42

- MISPLACEMENT 32, 33

- MYTHS REGARDING THE HANDICAPPED 5-6

Page

- NON-UNION EMPLOYER 53
- NOTATION OF HANDICAP 44
- NOTICE REQUIREMENTS 48
- OFFICE OF CIVIL RIGHTS: HEW
  - responsibility for administration of 504 8
- OFFICE OF FEDERAL CONTRACT COMPLIANCE
  - implementing regulations 7
- ORDER OF LAYOFF
  - (See Layoff)
- PHYSICAL BARRIERS
  - (See Reasonable Accommodation)
- PLACEMENT PRACTICES
  - advancement, potential for as factor 32
  - career counseling 32
  - dead-end job 32-33
  - discrimination 32
  - entry-level positions 32
  - essential requirements of job 32
  - experience 32
  - "ghettos" of handicapped workers 33
  - incidental duties 32
  - initial placement 32
  - job classifications 33
  - job lines 33
  - low-opportunity job 32-33
  - low-paying job 32
  - misplacement 32
  - opportunity for advancement 32
  - placement practices 32
  - reassignment 32
  - reasonable accommodation 32-33
  - restructuring 32
  - segregation 33
  - separate job classifications, job lines 33
  - training (See Training)
  - work assignments 33
- POSITIVE STEPS
  - obligation to take 7
- POSTING NOTICE OF VACANCY 48
- PREFERENTIAL TREATMENT
  - (See Layoff, generally all chapters)

Page

PRIVILEGES OF EMPLOYMENT
  (See Benefits, Privileges and Conditions of Employment)

PRO BONO LEGAL AID 3

PRODUCTION CUTBACKS
  (See Layoffs)

PROMOTION
- absenteeism as basis for denial of 42
- academic training 42-43
- administrative burden 46
- allocation of work on basis of 43
- annual performance ratings 42
- application for job vacancies 45
- bases for 42-43
- career counseling 46
- career ladders 43
- case study in 44-46
- client contact 44-45
- comparative educational backgrounds 42
- competitive status 43
- confidentiality of medical examinations 42
- creativity as basis for 42
- criteria for 42-43
- customer preference as factor in 44-45
- denial of promotion 45-46
- departmental seniority 43
- disclosure of handicap 44
- eligibility for 42-43
- employee preferences 43
- employment seniority 43
- equal qualifications 43
- graduate work as factor 42, 45
- job-relatedness of requirements 43, 46
- legitimate bases for denial of 43-44
- length of time in company as basis for 43
- limited inquiry into handicap permitted 44
- line of progression as basis for 43
- measures of seniority 43
- medical examinations 42
- mental handicap, testing of 42
- mention of handicap to other supervisors 44
- minimum qualifications as basis for 43
- motivation 42
- necessary to safe job performance 44
- notation of handicap on file 44
- on-the-job training 42
- passed over for promotion 45
- personnel files, who may see 44
- physical examinations 42
- posting notice of vacancy 42

Page

PROMOTION (cont.)
    preemployment inquiry 44
    primary job requirements 43
    qualifications for 43
    rearrangement of tasks 43
    reasonable accommodation 43
    reengineering 43
    restructuring 43
    seniority as basis for 43
    separate seniority lists 43
    skills as basis for 42-43
    tardiness as factor in denial of 42
    testing procedures, use in 42
    training, as factor in 42-43
    tuition payment 42-43
    union seniority 43
    written ratings of supervisors 42

QUALIFIED HANDICAPPED PERSON
    definition of 8

RATE RETENTION 48

RATES OF PAY
    actual work performance 37
    compensation 37
    disability income, effect on wages 39
    effort, as factor in wages 38
    equal pay requirements 37
    full job cycle 38
    job evaluation 37
    justifications for lower pay 38
    Kress method, evaluation of job 37
    lower wages 37
    pension income 39
    rate retention (See Transfer)
    reduction of income 39
    responsibility 37
    significant differences in work 37
    similar skill 37
    similar responsibility 37
    similar work 37
    skill 38
    substantial equality 37

REASONABLE ACCOMMODATION
    (See Chapter 3, generally all chapters, Glossary)
    adaptation of workplace 10, 11-12
    adaptive equipment 12
    case study 10-11
    examples of 11-13

Page

REASONABLE ACCOMMODATION (cont.)
interviews 13
job restructuring 13
legal obligation to make 10
restructure of workplace 11-12
restructure of work schedules 12-13
undue hardship 11

RECORD OF HANDICAP 8

RECRUITMENT 14-15, 20

RED-CIRCLING WAGES 48

REDUCTION OF INCOME
(See Rates of Pay)

REHABILITATION ACT OF 1973
covered employer 1-2
definition of handicap (See Glossary) 2
employers' obligation under federal law 1-2, 7-8
exceptions from coverage 1
federal law, employers' obligations under 1-2
notice requirements 1-2
scope of coverage under federal law 1

REQUEST TO TRANSFER 47

RESTRUCTURE OF WORKPLACE 11-12

RETROACTIVE SENIORITY
(See Layoff, Transfer)

SALARY
(See Rates of Pay)

SECTION 503
affirmative action obligation 20
application 20-21
effect of collective bargaining agreement 23
enforcement of rights under 24-27
evaluation of qualifications 22-23
final selection 23
interview 22-23
job-related requirements 21-22
non-discrimination obligation 20
recruitment 20
rejection 21-22
testing procedures 22

Page

SECTION 504
  action following refusal 16-17
  application 15-16
  case study 14-17
  discrimination 14
  effect of collective bargaining 19
  enforcement of agreement rights under 27-29
  essential requirements 16-17
  evaluation of qualifications 17-18
  final selection 18
  job-related requirements 16-17
  medical requirements 17
  recruitment 14-15
  testing requirements 17
  written qaulification examinations 17

SEGREGATION 33

SENIORITY SYSTEMS 43
  (See Transfer, Layoff)

SEPARATE
  facilities (See Reasonable Accommodation)
  job classification 32
  seniority lists 43
  training 35

SIMILAR WORK
  (See Rates of Pay)

SUBSTANTIAL EQUALITY OF WORK
  (See Rates of Pay)

SUMMARY OF LAW AND REGULATIONS
  affirmative action requirements 7
  complaint procedures 9
  coverage 7
  "in-house" procedures 9
  non-discrimination requirements 7
  Office of Federal Contract Compliance 7
  "qualified" handicapped person 8
  reasonable accommodation 7
  Section 503 7
  Section 504 7-8
  summary of law 7-9

SUPER SENIORITY
  (See Senioirity Systems)

SUPERVISOR RATINGS 42, 50-51

Page

TEMPORARY REASSIGNMENT........ 48

TERMINATION
  absenteeism........ 58
  advance notification........ 57
  degenerative condition as grounds for........ 60
  discrimination as grounds for........ 57
  failure of medical examination........ 59-60
  fines........ 57
  "for cause"........ 57
  future performance, predictability of........ 60
  grounds for........ 57
  job-relatedness........ 59-60
  lawful discharge........ 57
  low production........ 58
  mental handicap as factor........ 58
  minor infraction of work rules........ 57
  opportunity to refute charges........ 57
  physical barriers as cause........ 59
  physical handicap, because of........ 59
  poor job performance,........ 58-59
  poor supervision........ 59
  poor training........ 59
  reasonable accommodation as requirement........ 58-59
  refusal to work overtime........ 57-58
  safety hazard, handicap as........ 60
  suspension........ 57
  uniform enforcement of rules........ 57
  work rules violation........ 57

TESTING PROCEDURES
  as basis for promotion........ 42
  (See Job-Related Requirement)

TESTING REQUIREMENTS........ 17
  requirement of reasonable accommodation........ 17
  job-related abilities........ 16, 21-22

TRADING JOBS........ 49

TRAINING
  accessibility of training area........ 35
  adaptive equipment........ 34-35
  aide assignment........ 35
  application of training........ 36
  apprenticeship programs........ 34
  building location........ 35
  case study........ 35-36
  common adaptations........ 34
  conferences........ 34
  discrimination in program........ 34
  Division of Vocational Rehabilitation counselor........ 34

Page

TRAINING (cont.)
  individualized training.. 35
  job-related skills.. 34
  labor organizations, discrimination by.. 34
  leaves of absence to pursue.. 34
  on-the-job training.. 34
  pace of lecture.. 35-36
  physical location of building.. 35
  placement.. 34
  reasonable accommodation, duty to make.. 34
  remedial training.. 34
  selection into.. 35
  self-pacing programs.. 35-36
  separate training.. 35
  training materials.. 35

TRANSFER PRACTICES
  barriers to advancement.. 47
  bidding systems.. 47
  demotion through transfer.. 50
  departmental 47
  disabling illness.. 48-49
  disabling injury.. 48-49
  discrimination by sub-contractor.. 47
  downgrading of status.. 51
  higher-opportunity job lines.. 47
  job vacancies.. 48
  lateral transfer.. 48-49
  layoffs.. 50
  length of service.. 47
  "lightwork" jobs.. 50
  lines of progression.. 47
  low opportunity jobs.. 47
  medical examinations.. 49
  notice requirements.. 48
  partial work restrictions.. 49
  posting notice of vacancies.. 48
  rate retention.. 48
  reasonable accommodation.. 47, 49
  red-circling of wages.. 48
  reinstatement following injury or illness.. 48-49
  request to transfer.. 47
  retentention of wages.. 48
  supervisor ratings, as basis.. 50-51
  surplus.. 51
  temporary reassignment.. 49
  trading jobs.. 49
  voluntary transfer.. 49

Page

UNDUE HARDSHIP
  (See Glossary, generally all chapters)
  business necessity as factor.................................... 11
  financial cost.. 11
  nature and cost of accommodation................................ 11
  size of program... 11
  type of program... 11

UNIFORM ENFORCEMENT OF RULES
  (See Benefits, Termination, generally all chapters)

UNIONIZED COMPANY
  collective bargaining agreement................................. 53-54

VERBAL ABUSE.. 40-41

VOLUNTARY TRANSFERS... 49

WAGES... 37

WORK ASSIGNMENTS.. 32

WORK RULES VIOLATION.. 57

98

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BARRIER AWARENESS

who we are

The Regional Rehabilitation Research Institute on Attitudinal, Legal, and Leisure Barriers is located at George Washington University in Washington, D.C. We are a grantee of the Rehabilitation Services Administration, Department of Health, Education, and Welfare. Our mandate is to develop strategies for the reduction of invisible barriers to disabled citizens. Our activities have included experimental research, literature searches, the production of manuals (Implementation of 504 for Universities, Employment Rights Handbook), and publication of RE: SEARCH, a periodic topical brief on barrier issues. We are committed to consumer participation in our activities.

what is barrier awareness

BARRIER AWARENESS is a new project begun at the Institute this fall. In the coming years it will be the primary focus of the Institute's energy. Our first task is to survey the existing publications on attitudinal barriers and to acquire public information media on the disabled. After this initial task is completed, the Institute's staff will, in cooperation with consumer and advocacy groups, produce brochure/booklet sets on attitudinal barriers to selected disability groups. Brochures will be approximately two pages, and booklets approximately six or seven pages in length. They will discuss the nature of attitudinal barriers, how they can be reduced, and where more information can be obtained. Concurrent with the production of brochure/booklet sets will be the development of a lecture/presentation on attitudinal barriers. The Institute staff will be available to deliver the lecture/presentation after January 1, 1978, to local, state, and national workshops, symposia, conferences, meetings, and seminars. We want people to know about attitudinal barriers and what they can do about them.

you can help

We need you! We believe that attitudinal barrier information exists all over this country. You can help by sending us material you think has an impact on how people perceive the disabled (or a specific disability population). Perhaps you know of information packets or leaflets, articles, posters, handbooks, slide presentations, or publications that tell about the disabled (or a specific disability population). We would like to know about them, too. If you have such materials on hand, we would greatly appreciate it if you could send them to us. If you cannot send them free of charge, please let us know so we can arrange for payment. Any materials you have or know about will be appreciated, and original authorship will be safeguarded. One more thing: Attitudinal barriers are a part of everyone's life, disabled or not. If you have any ideas, thoughts, anecdotes, or suggestions, please let us hear from you.

Thanks for your help.

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